Supreme Court, U.S.
FILED

No. 931274

JAN 14 1994

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARSHALL J. KAGAN,

Petitioner

versus

EL SAN HOTEL & CASINO, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED FOR REVIEW

An employee of a company operating under the supervision of the Bankruptcy Court, discovers that the Trustees and their attornies are corrupt criminals, stealing from the estate, and protecting each other. He has them removed from office, charged, convicted, and in one case imprisoned, for their wrongdoing.

In retaliation, they fire him and blackball him, preventing him from working for several years.

A) Should an employee of a company operating under Bankruptcy Court supervision, when confronting crime, have to choose between remaining silent, or being punished in retaliation?

B) If federal statutory law offers no remedy, is this an appropriate situation for the application of federal common law?

(The Seventh Circuit, applying this Court's guidelines says yes. The First and Fourth Circuits say no. Courts in 33 states applying parallel state law say yes).

LIST OF ALL PARTIES

Petitioner - Marshall J. Kagan

Respondents - Estate of El San Juan Hotel

Hans Lopez Stubbe, et al

(successor trustee)

Rodrigo Otero Bigeles, etal

(successor trustee's attorney)

NOTE: Hector Rodriguez Estrada, was the former trustee, and a defendant when the case was filed. However at the time the case came to trial, he had already been imprisoned for the acts related in this case. He did not notify the Bankruptcy Court of his new address in the Federal Prison system, and was not notified of the proceedings. The Bankruptcy Court severed him from the trial. After the trial, and while the case was being appealed, the Bankruptcy Court acknowledged its error, and defaulted Rodriguez. Since Rodriguez is still

serving his 18 year sentence, and already has multi-million dollar judgements that far exceed any assets, no practical purpose would be served by attempting to reintroduce him to the case at this point.

TABLE OF CONTENTS

QUESTIONS PRESENTED

LIST OF PARTIES

OPINIONS BELOW

JURISDICTION

STATUTE INVOLVED

STATEMENT OF THE CASE

REASONS FOR GRANTING THE WRIT

a) The , "Public Policy Doctrine"

b) "Public Policy" in the State Courts

c) The Supreme Court Guidelines

d) Other factors in this case

CONCLUSION

APPENDIX

TABLE OF AUTHORITIES

Cases:	Page
Barany v Butler, 670 F2d 726, (1982)	25,26,29 30,31,34
Clearfield Trust Co. v United States, 318 US 363, 367, 63 S.Ct. 573,575	28
D'Oench, Duhme & Co. v FDIC,315 US 447, 468-470, 62 S.Ct. 676, (1942)	28
Erie RR v Tompkins, 304 US 64, 78, 58 S.Ct. 817, 822 (1938)	27
Harless v First Natl Bank in Fairmont, 246 SE 270, Sup Ct of W Virginia	22

Jackson v Mindoka, 98 Idaho 330, 563 P2d 54, (1977) 22

Ness v Hocks, 272 OR 210, 536 P2d 512, (1975) 24

Northwest Airlines, 101 S.Ct. 1581 30,31

Peterman v Intl Brotherhood of Teamsters 174 Ca App 2d, 184, 189, (1959) 20

Ridenour v Andrews Federal Credit Union, 897 F2d 715, (1990) 26,29 30,32

Schweiger v Superior Ct of Alameda County, 3 Cal3d 507, 90 Cal Rptr 729, 476 P2d 97, (1970) 23

Tameny v Atlantic Richfield Co. 164 Ca Rept 839, 610 P2d 1330 Sup Ct of Cal (1980) 21

Texas Industries, 101 S.Ct.

2067 29,30

THIS PAGE NOT USED

Miscellaneous:

Labor Law Journal, Jan 1988, pg 20

David Holmes 19

Supreme Court Practise (1986)

Stern, Gressman & Shapiro

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARSHALL J. KAGAN,

Petitioner

versus

EL SAN HOTEL & CASINO, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Marshall J. Kagan respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the First Circuit, entered in the above entitled proceeding on September 9, 1993.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, and the order denying a rehearing is reprinted in the Appendix.

JURISDICTION

This petition is timely filed, as the judgement was entered on September 9, 1993, and a petition for a rehearing was denied on October 18, 1993.

The jurisdiction of this Court to review the judgement of the First Circuit is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

Title 11, U.S. Code of Bankruptcy

(The parties in this case were involved in the administration of a company operating under Chapter 11 of the Bankruptcy Code. The main reference to

the code in this case, will be that the code does not provide the remedy sought).

STATEMENT OF THE CASE

Petitioner Kagan, a CPA, was the Controller of the El San Juan Hotel, when it filed under Ch XI in the Bankruptcy Court. Hector Rodriguez Estrada, was appointed Trustee. He mismanaged, stole money from the estate, and filed false tax and court reports.

Kagan confronted him, and demanded he stop his illegal acts, restore the stolen money and file corrected reports. Rodriguez not only refused, but instead insisted that Kagan testify before a Puerto Rico House of Representatives committee investigating the hotel, and tell them that his management was honest and efficient. When Kagan refused to commit such perjury, and took action to report the illegal activities, Rodriguez fired him.

Kagan organized a creditors' meeting, at which Rodriguez was voted out of office. He was replaced by a successor trustee, Respondent Lopez, and his attorney, Respondent Otero. The evidence of Rodriguez's crimes and mismanagement were presented to them by Kagan. After reviewing the evidence, they declared that Rodriguez was innocent, and presented this conclusion to the Bankruptcy Court in a formal report.

The reason for this conclusion was soon uncovered. **RODRIGUEZ HAD HIRED OTERO AS HIS ATTORNEY, AT THE SAME TIME OTERO WAS, "INVESTIGATING," HIM ON BEHALF OF THE HOTEL ESTATE.**

Otero violated Sec 327 of the Bankruptcy Act which prohibits such conflicts of interest, as well as the Bar Association Code of Professional Ethics. Lopez approved of Otero's acts.

Eventually other creditors and the IRS, acting on Kagan's evidence, despite Lopez and Otero's objections brought charges against Rodriguez. Civil judgements of $2 million were awarded, and he was convicted of theft and perjury, and is incarcerated serving an 18 year sentence.

Despite Rodriguez's conviction, Lopez and Otero continue to maintain that Rodriguez was correct to fire Kagan, and would only give him bad references. As a result, Kagan remained unemployed for 3 years.

When Otero's corruption in working for Rodriguez while, "investigating" him, was revealed, Federal Judge Fuste, forced Lopez to fire him. Charges of prejury, and motions to disgorge and forfeit fees are still pending against Lopez and Otero.

COURSE OF THE PROCEEDINGS

The case started in the Bankruptcy Court, and on motion of the defendants was transferred to the District Court, where after several years it was transferred back to the Bankruptcy Court.

The Bankruptcy Court ruled that Kagan had been wrongfully dismissed, and awarded him $7,000, the amount allowed under Puerto Rico Law 80. Claims for additional damages against Lopez, Otero and the estate, for the bad references that Lopez and Otero provided Kagan were dismissed, because the Court decided it lacked jurisdiction over corruption in the Bankruptcy Court.

The District Court affirmed the wrongful dismissal award. The Court disagreed with the Bankruptcy Court's decision that it lacked authority to decide matters involving corruption in

the Bankruptcy Court. Instead the Court substituted the standard of the, "reasonable employer," and found that reasonable employers had no duty to provide correct references. (The decision did not address the question if employers had a duty not to provide false references).

The Court of Appeals also affirmed the wrongful dismissal decision. It found no grounds for additional relief under state or federal statutory law.

As to federal common law, the Court, disagreeing with the Seventh Circuit, found no basis for application in such situations.

Jurisdiction in the court of first instance is under 28 USC 1334 and 28 USC 157.

REASONS FOR GRANTING THE WRIT

a) The, " Public Policy" Doctrine

The "Public Policy" Doctrine is based on the assumption, that when a Legislature passes a law, it wants that law obeyed. Acting on that premise, Courts in 33 states have fashioned common law remedies protecting individuals who were punished for refusing to commit crimes, reporting crimes, or just obeying the law. (See LABOR LAW JOURNAL, Jan 1988, pg 20, article by David Holmes, law professor).

The most common situations involve employees, because employers have the power to retaliate. But, there are other instances, such as board members removed from office, and tenants evicted by their landlords.

Courts reasoned that if a person could be punished for obeying the law, it would undermine the law. Since this doctrine has been widely applied under state common law, we will review this area first. Then the more limited use under federal common law and this Court's guidelines for federal common law will be discussed.

b) "Public Policy" in the State Courts

The first major case involved an employee, who was dismissed for refusing to obey his employer's instructions to commit perjury, but instead testified truthfully. The Court explained, in "Peterman v Intl Brotherhood of Teamsters, (174 Cal App 2d 184, 188, 1959):

> "The commission of perjury is unlawful ...It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to

> discharge any employee... on the ground that the employee declined to commit perjury, an act specifically enjoined by statute...The public policy of this state, as reflected in the Penal Code sections referred to above would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury. To hold that one's continued employment could be made contingent upon his commission of a felonius act at the insistence of his employer would be to encourage criminal conduct upon the part of both the employee and employer, and serve to contaminate the honest administration of public affairs."

In Tameny v Atlantic Richfield Co. 164 Cal Rept. 839, 610 P2d 1330 Sup Ct of Cal, 1980) the employee was fired for refusing to participate in an illegal scheme to fix retail gasoline prices. The court decided:

> "We hold that an employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging

in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer."

In Jackson v Mindoka, (98 Idaho 330, 563 P2d 54, 1977) the Idaho Supreme Court stated the doctrine in the following fashion, although it declined to apply it under the particular facts of the case:

"As a general exception to the rule allowing either the employer or the ewmployee to terminate the employment relationship without cause, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy."

In Harless v First Natl Bank in Fairmont (246 SE 2d 270, Sup Ct of Appls of W Virginia), an employee was discharged because he objected to his employer's actions in overcharging customers in violation of West Virginia law. This was the first case decided by a

state court in favor of a, "corporate whistleblower." He was awarded $125,000 in compensatory and punitive damages. Significantly the executive responsible for the discharge was ordered to pay a larger share, $75,000; $10,000 for the act of firing, $40,000 for, "outrageous conduct causing emotional distress" and $25,000 for blackballing." (bad references).

In a landlord-tenant case, Schweiger v Superior Court of Alameda County (3 Cal3d 507, 90 Cal Rptr 729, 476 P2d 97, 1970) stated:

> "Both Glenn and Peterman persuasively instruct us that one may not exercise normally unrestricted power if his reasons for its exercise contravene public policy. Clearly sections 1941 and 1942 express the policy of this state that landlords in the interest of public health and safety have the duty to maintain leased premises in habitable condition and that tenants have the right after notice to the landlord, to repair dilapidations and deduct

> the cost of repairs from the rent. The policy expressed in these sections cannot be effectuated if landlords may evict tenants who invoke the provisions of the statute. Courts, would be withholding with one hand what the legislature has granted with the other if they order evictions instituted in retaliation against the exercise of statutory rights."

Another case was about an employee not going to work, because she was summoned to jury duty. Her employer fired her for missing work. The Court after reviewing the statutes concerning jury duty, found that there was a substantial, "public policy" favoring jury duty. Accordingly, the employee was found to have a cause of action against her employer. Ness v. Hocks (272 OR 210, 536 P2d 512, 1975).

Virtually all the state courts that have ruled on, "public policy" cases in the last 20 years, have favored the doctrine. In some case legislatures have

later codified the doctrine for certain situations.

c) The Supreme Court Guidelines

In several decisions, this Court has ruled on whether or not federal common law was applicable. None of the decisions involved, "Public Policy" as discussed here. However, two principles emerged, which the Circuit Courts are using as guidelines. Unfortunately, they come to opposite conclusions.

We will briefly review the Circuit Court cases, then the Supreme Court guidelines, and then see where the Circuits differed.

The Seventh Circuit case, Barany v Butler, 670 F2d 726, 1982, involved members of a federal credit union's credit committee who were removed from office, because of their insistence that federal credit union laws restricting

loans to non-members be obeyed. The Court found that they had no private right of action under existing credit union laws, but they did have a cause of action under federal common law.

The Fourth Circuit case, Ridenour v Andrews Federal Credit Union 897 F2d 715 (1990), concerned credit union employees, who were terminated for attempting to uphold federal laws. The decision found they had no cause of action under federal common law. The 4th Circuit specifically disagrees with the 7th Circuit's *Barany* decision:

> "We respectfully disagree with the contrary holding of the Seventh Circuit in *Barany*."

The First Circuit, in the case at bar, also found no grounds for a federal common law remedy, for an employee dismissed and blackballed for upholding the law.

The current analysis of federal common law starts with Erie RR v Tompkins, 304 US 64,78,58 S Ct. 817,822, 82 Led 1188 (1938) finding, that though there is, "no federal general common law," there is a recognized, "need and authority" for federal courts to create specific federal common law in some carefully limited circumstances.

Justice Jackson in discussing situations in which no federal statute clearly applies, stated:

> "whether in deciding the case we are bound to apply the law of some particular state or whether, to put it bluntly, we may make our own law from materials found in common law sources....(To say that federal courts have no general common law) is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all the source materials of the common law, ...
>
> Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all complete statutory codes, and

is apparent from the terms of the Constitution itself."

D'Oench, Duhme & Co. v FDIC, 315 US 447, 468-470, 62 S.Ct. 676, 684-685, 86 LED 956 (1942) See also Clearfield Trust Co. v United States, 318 US 363,367, 63 S.Ct. 573, 575, 87 LEd 838 (1943):

"In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."

In later Supreme Court decisions, two requirements, have emerged for the application of federal law.

First, where, "necessary to protect uniquely federal interests," Banco Nacional de Cuba v Sabbatino 376 US 398,426, 84 S.Ct 923, 939, L.Ed 2d 804 (1964).

Second, the absence of a statutory remedy in existing legislation. Illinois II, 101 S.Ct at 1791 n.8, Northwest Airlines, 101 S. Ct. 2068.

1. "Uniquely federal interest"

In *Barany*, the Court traced the history of credit unions in the nation, some state chartered, some federal chartered, the problems of obtaining economical consumer loans, the effect on the economy, and finally the need for increased federal regulation, to establish the, "uniquely federal interests."

In *Ridenour*, there is no review made of the federal credit union system as in *Barany*. Instead, reliance is placed on the omission of federal credit unions from areas where the Supreme Court has previously found, "uniquely federal interests," i.e. cases involving,

"the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations and admiralty.. " Texas Industries, 101 S. Ct. 2067

In the case at bar, the First Circuit took the same tack as the *Ridenour* Court, i.e. if the Supreme Court hasn't specifically included it, it is excluded.

However, the Bankruptcy Court system is exclusively a federal creation. Its control over the finances of thousands of large businesses, and hundreds of thousand individuals, and its staffing by federal personnel, make it at least as worthy of designation as a, "unique federal interest" as the federal credit union regulatory system.

2. **Absence of Statutory Remedy**

In *Barany*, the Seventh Circuit reviewed the Supreme Court decisions in Northwest Airlines101 S.CT. 1581, and Texas Industries101 S.Ct. 2068. The principle that emerged, was that the existence of a **comprehensive statutory**

remedial scheme would be a bar to federal common law relief. *Barany*, drawing on Northwest Airlines 101 S.Ct, 1584 expressed the point:

> "..where a federal common law remedy is asserted and there is a pertinent federal statute with an integrated system of remedies which omits that remedy, we must presume that Congress_deliberately omitted the asserted remedy. In that case we may not fashion new remedies that upset the legislative scheme."

In federal credit union legislation, there was provision for review and remedy for board members who were removed by the National Credit Union Board, but not for those removed by the local board. *Barany*, in the absence of any contrary legislative intent, assumed this was not a complete integrated system, and therefore was not a bar to federal common law. *Barany*, concluded:

> "Thus statutory remedies which do not afford aggrieved parties at least a reasonable facsimile of the relief sought under federal common

law, do not preclude federal common law remedies."

In *Ridenour*, the Fourth Circuit concluded that the legislation covering remedies for removed credit union board members was extensive enough to be a complete system, and therefore it should be assumed that lack of review for board members removed by local boards was a deliberate legislative omission.

Since the Bankruptcy Act, does not have anything close to a complete remedial system, this point should not be relavent to the case at bar. However, the First Circuit took another tack. Noting that Congress has passed protective legislation for whistleblowers in other areas, e.g. defense contractors, the Court maintains, "that Congress has not though appropriate," to provide such protection for persons covered by the Bankruptcy Act.

But, this approach does not reflect the reality of how Congress passes laws. Typically, each area is studied and legislated independently. It would be an impossible leap, to assume, that when Congress passed protection for whistleblowers in connection with defense contractors, they had even considered the Bankruptcy System, let alone decided not to provide protection in that area.

d. Other factors in this case

The First Circuit raised several other points, in the decision in this case. First it was claimed that there is no need for uniformity in Bankruptcy law, because state law is often used, as contrasted to federal credit unions that only use federal law. This is not correct, as federal credit unions often utilize state law in the same manner as

the Bankruptcy Courts, for example in deciding property rights.

Second, it was claimed that the *Barany* decision applied only to federal credit unions, and was no precedent for the Bankruptcy Court. While legislation cannot jump between federal areas, judicial principles can and do.

Third it was asserted that federal ommon law can only be applied when necessary federal interests are in conflict with state law. We interpret this simply to mean that if state law does not provide a remedy that will support the federal interest, (in this case upholding federal laws), then federal common law may be applicable. In the present case the First Circuit decided that state law did not provide a remedy that would support the federal interest. (We disagree with some of the

Court's findings relative to state law, e.g. refusal to consider the doctrine of compelled self defamation, and conclusion that certain issues had not previously been raised. However, these points are not subject to review here. We simply start with the Court's conclusion that state law does not provide a remedy to support the federal interest).

Fourth, the Court mistakenly assumed that the claim under federal common law applied only to the estate. It applies to all the defendants.

CONCLUSION

The, "Public Policy" doctrine has won acceptance in most states, and some federal courts, because of its inherent logic. If the Legislature makes laws, it wants them obeyed. To encourage compliance, citizens should be protected

from retaliation for obeying the laws, or reporting violations.

Since federal and state statutory laws, often do not provide such protection, state common law is appropriate to uphold state laws, and federal common law to uphold federal laws, applying this Court's guidelines.

Without such a remedy, the corrupt trustee's and attornies who were exposed by Kagan, and removed from office will have the last laugh. Kagan, "got them" but after all, they broke the law. They have been able to retaliate by firing him and giving him bad references that crippled a 30 year career as a CPA. The criminals sit in jail laughing, while Kagan has to explain to family and friends, that yes, he put the bad guys behind bars, but the courts believe that

its quite allright for the criminals to punish him in retaliation.

A review of this case will resolve the differences between the circuits. **This in turn, could substantially raise the level of compliance with federal law,** as lawbreakers are deprived of a weapon to compel silence, or pressure individuals to join them in breaking the law. Lawbreakers will no longer be able to retaliate with impunity.

What will this case tell citizens who come upon crime and corruption? "Close your eyes, or prepare to get hurt." Or, **"If you uphold the law, the law will protect you from retaliation."**

Respectfully submitted

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December 31, 1993

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1202

MARSHALL J. KAGAN
Appellant,

v.

EL SAN JUAN HOTEL CORPORATION, ET AL.,
Appellees.

Before

Breyer, Chief Judge
Torruella, Selya, Cyr, Boudin and Stahl,
Circuit Judges

ORDER OF COURT

Entered October 18, 1993

The petition for rehearing with the suggestion for rehearing en banc is denied.

By the Court:

Francis P. Scigliano
Clerk

September 9, 1993 [NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1202

MARSHALL J. KAGAN,

Apellant,

v.

EL SAN JUAN HOTEL & CASINO, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO
[Hon. Jose Antonio Fuste, U.S. District Judge]

Before

Cyr, Boudin and Stahl,
Circuit Judges.

Marshall J. Kagan on brief pro se.
Daniel R. Dominguez, Marie E. Lopez-Adames and Dominguez &Totti on brief fo appelees El San Juan Hotel Corp. & Hans Lopez Stubbe.
Carlos A. Quilichini and Ramon Lloveras Otero on brief for appellee Rodrigo Otero Bigles.

Per Curiam. Appellant Marshall J. Kagan appeals the district court order affirming an order of the bankruptcy court. The district court found that Kagan's sole remedy for alleged harm following upon his dismissal from his position as comptroller of the El San Juan Hotel was pursuant to the Puerto Rico wrongful termination statute, 29 L.P.R.A. 185a. The court dismissed his other claims for relief. We affirm.

The factual as well as the procedural background to this case are complex. We summarize from the facts found below. See Kagan v. San Juan Hotel Corp., 149 B.R. 263 (D.P.R. 1992)

Kagan was comptroller of the El San Juan Hotel when it filed for bankruptcy under Chapter 11 in 1980.

Kagan continued in his position under the court appointed bankruptcy trustee, Hector Rodriguez Estrada. After frequent disagreements between Kagan and Rodriguez as to how the estate should be managed, appellant was dismissed for unsatisfactory performance in December 1982. Kagan asserts that he was dismissed in retaliation for attempting to have the trusteeship of Rodriguez investigated.

In March 1983, the Chapter 11 proceeding was converted to a Chapter 7 proceeding. In September 1983, Rodriguez was removed from the trusteeship by a unanimous vote of the creditors and replaced by appellee Lopez. Kagan urged Lopezorney, to file suit against Rodriguez for abuse of his position. When they refused to file suit

alleging that there was insufficient evidence against Rodriguez, Kagan accused Lopez and Otero of covering for Rodriguez. In 1985 suit was filed against Rodriguez by the United States as one of the estate's creditors. Rodriguez was found to have abused his trusteeship and a judgment of over 2 million dollars was imposed on Rodriguez on behalf of the estate. In Re San Juan Hotel Corp., 71 B.R.413 D.P.R. 1987), aff'd in part and rev'd in part, 847 F.2d 931 (1st Cir. 1988). Subsequently Rodriguez was convicted and sentenced for fraud.

Kagan commenced suit against the estate and Rodriguez in March 1983. Kagan sought both compensation for wrongful termination and the removal from his personnel file of a letter indicating that he had been

terminated for poor performance. When Lopez replaced Rodriguez, Kagan amended his suit and sought compensation, removal of the negative letter and a new letter of reference from Lopez and Otero. Although Lopez agreed to compensation for wrongful termination, he refused to remove the old letter or write a new one. Kagan asserts that the failure to remove the old letter from his file and to provide a new "corrected" letter prevented him from obtaining new employment for several years and then resulted in his being compelled to accept a position at lower wages than he had previously earned.

Kagan's suit "wend[ed] a torturous path through the judicial system." Kagan, 149 B.R. at 268. Trial in the bankruptcy court did not commence until May 1988. In September 1990 the

bankruptcy court dismissed all claims against Lopez and Otero and allowed Kagan damages against the estate pursuant to 185a. The final order of the bankruptcy court did not issue until March 23, 1992. Kagan appealed the dismissal of his claims other than that under 185(a) to the district court which affirmed.

On appeal to this court, Kagan seeks damages against Lopez and Otero for the failure to provide him with a new letter of reference. He also seeks additional damages from the estate for his wrongful dismissal.1

1. In his prayer for relief, Kagan asks this court to "[r]emand to the Bankruptcy Court for appropriate action on the pending motion for Otero to disgorge his fees, and for Lopez to be removed from office and [to] forfeit[] his fees." The district court dismissed

the claim against Otero on the ground that Kagan lacked standing to raise this claim in the context of a wrongful discharge suit. Kagan, 149 B.R. at 270-72. We agree. Moreover, although the district court did not address the claim against Lopez, that claim would suffer the same defect. In any event, since Kagan has presented no argument to support this prayer in his brief, the issue is waived. Ryan v. Royal Ins. Co., 916 F.2d 731, 734 (1st Cir. 1990) (issues adverted to on appeal in a perfunctory matter are deemed waived).

Claims Against Lopez and Otero

Kagan concedes that 29 L.P.R.A. 185a is the sole remedy for his claim of wrongful dismissal under Puerto Rico law. Weatherly v. International Paper Co., 648 F.Supp. 872 878 (D.P.R. 1986) (citing cases). However, he notes that

185a does not prohibit recovery when an employee "can establish that the employer committed an independent tortious act in the course of terminating employment." Id. at 877-78. Kagan asserts that in this case Lopez and Otero committed the independent tortious act of not correcting the record of dismissal and giving false bad references."2

2. We assume, without deciding, that the failure to provide corrected references and the supplying of false ones would be within "the course of terminating employment."

He seeks recovery under 31 L.P.R.A. 5141 which provides that

> A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done.

To state a claim for damages under 5141, a plaintiff must show (1) that the defendants owed him a duty to prevent the harm suffered; (2) that the duty was negligently breached; and (3) that the breach caused the plaintiff harm. Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co., 958 F.2d _1169, 1171 (1st Cir. 1992) (citing cases). In this case, Kagan has shown no basis for inferring that either Lopez or Otero had a legal duty to correct his references which had been given by the previous trustee Rodriguez ten months before Lopez and Otero arrived on the scene. Even assuming that Lopez and Otero were employers of Kagan, they were under no obligation to provide any references to him. See 48 Am.Jur.2d. Labor and Labor Relations 43 (in absence of statute "employer who

discharges an employee is not liable to the employee for his refusal to give the employee a 'character' or recommendation").3

3. Kagan's reliance on Ackerman v. Thompson, 356 Mo. 558, 202 S.W.2d 795 (1947), is in vain. In Ackerman, a state statute compelled the employer to provide a "service letter" upon terminating an employee. Puerto Rico has no such statute

Therefore, we cannot see why they would be required to provide "corrected" ones. "It is axiomatic that the failure to perform an act cannot give rise to a cause of action unless there was a legal duty to act." Torres v. United States, 621 F.2d 30, 33 (1st Cir. 1980) (applying Puerto Rico law). Nor would it be reasonable to require Lopez and Otero to provide "corrected" references

for an employee whom they never employed and whose performance they were therefore in no position to evaluate. Finally, while Lopez and Otero owe fiduciary duties to the bankrupt estate, see In Re Thompson, 965 F.2d 1136, 1145 (1st Cir. 1992), and to its creditors, In Re Consupak, Inc., 87 B.R. 529, 539 (Bankr.N.D.Ill. 1988); Bankruptcy Code 704(1), 11 U.S.C. 704(a) (duties of trustee), this duty does not extend to Kagan who is seeking damages not as a creditor of the estate but as a former employee of it.4

4. The district court found that Otero, as the estate's attorney, owed no duty to the employees of the estate. Kagan, 149 B.R. at 273. However, the district court did state that Lopez owed a duty to Kagan to act as a

reasonable employer. Id. Since we find that Lopez owed no duty to Kagan to provide corrected references, Kagan's claim would be subject to dismissal under the "reasonable employer"standard as well.

On appeal, Kagan also asserts that Lopez and Otero harmed him by providing false references. However, this claim was not raised below and therefore is not properly before us. Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979). In any event, Kagan admits that he never actually sought any references for a prospective employer from Lopez or Otero and that the uncorrected letter was never disseminated. His claim to have been harmed by receiving false references is devoid of merit.

Similarly without merit is Kagan's reliance on 107, 704 and 1106(a) of the Bankruptcy Code. Section 1106(a), through incorporation of 704, provides that "[t]he trustee shall unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest." 11 U.S.C. 704(7). Section 107 provides that "the bankruptcy court shall protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case nder this title." 11 U.S.C. 107(b)(2). Alleging that the uncorrected reference was defamatory, Kagan seeks to find in these provisions a duty on the part of the trustee to provide proper references and to revise false ones. However (1) any duty under the Bankruptcy Code to

prevent the dissemination of defamatory material is imposed on the court not the trustee; (2) the allegedly defamatory letter is not a "paper filed" in a bankruptcy case; and (3) as noted above, Kagan concedes that the letter was never disseminated.

Claim Against the Estate

Kagan asserts that he is entitled to relief under the federal common law for his wrongful dismissal. According to Kagan, he was dismissed because he tried to stop the bankruptcy trustee from violating federal law. Moreover, he alleges that the Puerto Rico wrongful dismissal statute provides insufficient protection because of the limited amount of compensation the statute provides. Citing the federal interest in seeing that federal law is not violated,

Kagan asks this court to formulate federal common law based on analogous state court decisions which have found a "public policy" exception to the employment-at-will doctrine where an employee is terminated for refusing to participate in illegal acts.

The instances in which a federal court has the authority to formulate a federal common law remedy are "few and restricted." Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963). Absent some statutory authorization to formulate substantive rules of decision, and none is alleged here, the court has authority to create a federal common law remedy only when it is "necessary to protect uniquely federal interests." Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640, (1981) (quoting Banco Nacional de Cuba

v. Sabbatino, 376 U.S. 398, 426 (1964)). It is not enough that a remedy "supplements federal enforcement and fulfills the object of the statutory scheme." Id. at 642. Federal common law is appropriate only where "the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control." Id. at 641. Moreover, "[i]n deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." Wallis v. Pan American Petroleum Corp., 384 U.S 63, 68 (1966).

We find no such "uniquely federal interests" in this case which would warrant the formulation of federal common law. Furthermore, no conflict exists here between the federal policy to be promoted and the application of state law. The Commonwealth of Puerto Rico, like most states, already provides protection for those dismissed for acting in accordance with law. Finally, the rationale on which Kagan relies--i.e., that the court ought to formulate a federal common law remedy to protect those dismissed for upholding federal law--would apply to all federal regulatory schemes. Yet, Congress has chosen to enact specific protections for "whistle-blowers" where it has thought appropriate. See Note, Protecting Employees at Will Against Wrongful Discharge: the Public

Policy Exception, 96 Harv.L.Rev. 1931, 1934 (1983) (listing federal statutes). In adopting Kagan's rationale, we would not only be extending this protection into areas where Congress has not thought appropriate but we would be ignoring the Supreme Court's advisory that the appropriate occasions for the formulation of federal common law are "few and restricted." Wheeldin, 373 U.S. at 651. We decline to do so. Kagan calls our attention to Barany v. Buller, 670 F.2d 726 (7th Cir. 1982). In Barany, the court formulated a federal common law remedy for reinstatement of federal credit union employees allegedly dismissed in violation of federal laws. This case is distinguishable from Barany in two ways. First, the decision in Barany was based in part on the congressional desire to "insure uniform

development in credit unions." Id. at 733. In contrast, no similar desire for national uniformity is found in congressional control over bankruptcy law. Butner v. United States, 440 U.S. 48, 54 n.9 (1979) (bankruptcy law frequently recognizes state substantive law). Second, the rationale of Barany--that the federalization of the governance of an institution makes it of "uniquely federal interest"--was limited to federal credit unions and similar federal institutions. Barany, 670 F.2d at 734. We see no principled way to limit the rationale for the remedy sought in the present case.5

5. We also note that the Fourth Circuit has disagreed with the Barany holding. Ridenour v. Andrews Federal Credit Union, 897 F.2d 715, 721-22 (4th Cir. 1990) (declining to fashion

federal remedy as a matter of federal common law to create cause of action for federal credit union employees challenging adverse employment actions). The opinion of the district court is affirmed.

Supreme Court, U.S.
FILED
931274 JAN 14 1994
OFFICE OF THE CLERK

(2)

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARSHALL J. KAGAN,

Petitioner

versus

EL SAN HOTEL & CASINO, ET AL.,

Respondents

SUPPLEMENTAL ADDENDUM

Marshall J. Kagan
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49 pp

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

IN RE:	*	
	*	Civil 92-1940
EL SAN JUAN HOTEL CORP	*	(JAF)
	*	(Bank 80-259
Debtor	*	SEK)
	*	(Adv 83-183)

MARSHALL J. KAGAN	*
Plaintiff-Appellant	*
v.	*
	*
EL SAN JUAN HOTEL CORP.;	*
HECTOR RODRIGUEZ ESTRADA;	*
HANS LOPEZ STUBBE;	*
RODRIGO OTERO BIGLES, etal	*
	*
Defendants-Appellees	*

JUDGMENT

Pursuant to the terms and conditions of an Opinion and Order announced by the court today, judgment is now entered affirming the bankruptcy court's order of March 26, 1992, awarding Marshall J. Kagan compensation under 29 L.P.R.A Sec 185a as the only compensatory remedy.

San Juan, Puerto Rico, this 29th day of December, 1992.

JOSE ANTONIO FUSTE
US DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

IN RE:	*	
	*	Civil 92-1940
EL SAN JUAN HOTEL CORP	*	(JAF)
	*	(Bank 80-259
Debtor	*	SEK)
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MARSHALL J. KAGAN	*
Plaintiff-Appellant	*
v.	*
	*
EL SAN JUAN HOTEL CORP.;	*
HECTOR RODRIGUEZ ESTRADA;	*
HANS LOPEZ STUBBE;	*
RODRIGO OTERO BIGLES, etal	*
	*
Defendants-Appellees	*

OPINION AND ORDER

Plaintiff is appealing an order entered by the bankruptcy court on March 26, 1992, awarding him compensation for discharge from employment without just cause under 29 LPRA Sec 185a. Plaintiff is not appealing the severance pay award, but rather the court's determination that this state statute is his only compensatory remedy, excluding other

substantial monetary amounts of damage allegedly suffered. In addition, plaintiff-appellant raises two additional issues on appeal: whether the bankruptcy court erred in finding that the successor trustee owed no fiduciary duty requiring him to write plaintiff letters of recommendation and provide compensation for plaintiff's termination, and whether the bankruptcy court erred in finding that it had no authority to hear the claims against the estate's attorney on both the issues of his fiduciary duty to plaintiff and plaintiff's claim that he provided false information to the court. We find that the bankruptcy court correctly determined that section 185a is plaintiff's sole remedy under Puerto Rico law. We find that neither the successor trustee nor the estate's attorney owed a fiduciary duty to the plaintiff. We also

find that plaintiff had no standing to bring an action under 11 USC sec 327 regarding the appointment of the estate's attorney. This court has appellate jurisdiction under 28 USC sec 157.

I.

FACTS

This case involves two interconnected episodes. One is the account of the bankruptcy of the El SWan Juan Hotel. Plaintiff, Mr. Kagan, was involved in uncovering the corruption which pervaded that bankruptcy. The other story is that of plaintiff's termination from his position as comptroller of the El San Juan Hotel. That is the topic of this suit. However, the two episodes are so tangled that it is difficult to sort one from the other. We must sketch the outlines of the first episode to make the second story comprehensible.

A) The Bankruptcy of the El San Juan Hotel

Plaintiff, a certified public accountant, was the comptroller of the El San Juan Hotel when it filed for Chapter 11 bankruptcy in May 1980. At the time of the filing of the petition for bankruptcy, the plaintiff had been working for the hotel for less than a year, having been hired for an indefinite term. In the context of the Chapter 11 bankruptcy, the hotel continued its normal operation under the auspices of the court-appointed trustee according to law. 11 USC sec 1101-1146. Plaintiff continued in his job as comptroller until he was terminated by the court-appointed trustee, Hector Rodriguez-Estrada, for unsatisfactory performance. Plaintiff claims that he was dismissed in retaliation for his attempts to have the trusteeship of Rodriguez-Estrada

investigated and he should be compensated for the harm done to him by the dismissal.

1. **The Corrupt Trusteeship of Rodriguez-Estrada**

Rodriguez-Estrada was appointed as trustee for the estate of the El San Juan Hotel on July 11, 1980. From the beginning, Rodriguez-Estrada and the plaintiff had disagreements as to how to manage the estate. Subsequent litigation revealed Rodriguez-Estrada's management strategy to have been an abuse of Rodriguez-Estrada's trusteeship. In Re San Juan Hotel Corp., 71 BR 413 (DPR 1987), aff'd in part, 847 F2d 931 (1st Cir. 1988). "The ...trustee, Rodriguez-Estrada, seeking personal gain, and by wilful, deliberate, intentional, and reckless conduct, disregarding the impact his actions and omissions would have upon

the debtor's estate, failed to follow the advice of the hotel comptroller, Marshall J. Kagan, on proposed actions which could have substantially reduced operating expenses." Id. at 420. These disagreements caused plaintiff to begin pressing for the investigation of Rodriguez-Estrada's trusteeship. Plaintiff represents his role in exposing the corruption of the the trusteeship of Rodriguez-Estrada as having been substantial. It is certainly true that plaintiff's complaints contributed to the investigation of the trustee. Plaintiff alleges he was terminated shortly after he gave testimony before the Puerto Rico House of Representatives' Committee on Tourism. His televised statements were highly critical of the trusteeship of Rodriguez-Estrada. Plaintiff was terminated on December 29, 1982 for

unsatisfactory performance. He filed suit for slander and wrongful termination against Rodriguez-Estrada and the estate in bankruptcy court on March 10, 1983.

The fortunes of the hotel continued to decline under the trusteeship of Rodriguez-Estrada. At the end of March 14, 1983, the hotel closed to the public. On March 24, 1983, the financial condition of the hotel being unstable

the Chapter 11 proceeding was converted to a Chapter 7 proceeding on the motion of Puerto Rico Electric Power Authority. Rodriguez-Estrada acted as the Chapter 7 liquidation trustee until September of 1983, when he was removed from the trusteeship by a unanimous vote of the creditors as a Section 341 creditors' meeting plaintiff alleges he arranged. Plaintiff, having an outstanding lawsuit, was a creditor and presumably allowed to

participate in creditors' meetings. It is clear from the record that he was determined to oust Rodriguez-Estrada. Rodriguez-Estrada was replaced as trustee by Hans Lopez-Stubbe.

2. **The Cautious Trusteeship of Lopez-Stubbe**

It was under the trusteeships of Lopez-Stubbe that the question of whether an action should be filed against Rodriguez-Estrada first arose. Plaintiff actively lobbied various people related to the estate to bring suit against Rodriguez-Estrada. When plaintiff urged Lopez-Stubbe to file suit against Rodriguez-Estrada for abuse of his position as trustee, Lopez-Stubbe refused. Plaintiff corresponded with Lopez-Stubbe during this period. On December 29, 1983, the anniversary of his termination, he wrote to Lopez-Stubbe,

exhorting him to take action in accordance with information Kagan had provided. On January 3, 1984, Rodrigo Otero-Bigles, the estate's attorney, wrote to Kagan on behlaf of Lopez-Stubbe, in response to the letter. In that letter, the trustee stated that it was his opinion that there was not sufficient evidence against Rodriguez-Estrada. The trustee's refusal may have been based upon the advice of Otero-Bigles, who was appointed by Lopez-Stubbe in his capacity as trustee. Kagan accused Otero-Bigles of representing the interests of Rodriguez-Estrada in recommending that the trustee not bring suit against the former trustee. During this period, Otero-Bigles was apparently representing Rodriguez-Estrada in another matter before the bankruptcy court. Otero-Bigles had submitted an affidavit representing to

the court that he was, "disinterested" as required by 11 USC 327, and the court had approved his appointment. Plaintiff's accusation of bias on the part of Oter-Bigles led to harsh words between him and Otero-Bigles. Plaintiff maintained that not only did Otero-Bigles violate the bankruptcy codes, but that he together with Lopez-Stubbe, was involved in a cover-up to protect Rodriguez-Estrada.

The controvery of wqhether or not to prosecute Rodriguez-Estrada ended in a flurry of lawsuits. The United States, one of the estate's largest creditors, brought suit against Rodriguez-Estrada on behlaf of the estate. It was granted the authority to file an action by order of the bankruptcy court on April 17, 1985. On May 117, 1985, the United States filed an action referred to as San Juan Hotel I. Around the same time, Kagan was

contemplating a suit on behalf of the estate. Lopez-Stubbe's "Trustee's Report to the Court" of May 16, 1985 sketched out the increasingly hostile disagreement between the estate's representatives and Kagan on the issue of whether to file suit. It ended with the opinion of the trustee that the evidence was insufficient to sustain a lawsuit. Kagan felt Lopez-Stubbe was improperly refusing to bring the suit. Kagan filed a motion with the bankruptcy court requesting authorization to file suit on behlaf of the estate. This was granted and, on October 7, 1985, Kagan filed on behalf of the estate, and action referred to as San Juan Hotel II. San Juan Hotel IIwas opposed by the trustee, Lopez-Stubbe, as duplicative, and was dismissed on March 17, 1987 for that reason. See in Re El; San Juan Hotel Corporation, 841 F2d 6

(1st Cir 1988). San Juan Hotel I, the suit brought by the United States ended on March 4, 1987, when the court imposed a judgment on Rodriguez-Estrada in the amount of $2,137,639.60. In re San Juan Hotel Corp., 71 BR 413 (DPR 1987), affd in part and reversed in part, In re San Juan Hotel Corp., 847 F2d 931 (1st Cir 1988). In a subsequent criminal case, Rodriguez-Estrada was convicted for fraud and sentenced on September 9, 1988.

B. The History of Kagan's Wrongful Termination

1. The Factual History

The second episode is that of plaintiff's termination from his position as comptroller on December 29, 1982 by Rodriguez-Estrada, for unsatisfactory performance. At the time of plaintiff's termination, Rodriguez-Estrada placed a letter in Kagan's personnel file

indicating that he was terminated for his failure to perform adequately. Rodriguez-Estrada also made critical statements regarding plaintiff's behavior which were published by the press. Plaintiff alleges that these statements and the letter in his file made it difficult for him to obtain another job.

When plaintiff sought to meet with Rodriguez-Estrada, he was never available. Plaintiff wanted to protest the circumstances of his dismissal and demand the removal of the letter from his file. Rodriguez-Estrada did eventually meet with plaintiff to discuss plaintiff's termination. However, only he and Mr. Kagan knew what ocurred in the meeting. No record of what occurred in the meeting was ever produced. According to plaintiff, at this meeting, Rodriguez-Estrada agreed to destroy the December

29th letter of dismissal and substitute another letter. Plaintiff also claims that Rodriguezz-Estrada agreed to pay plaintiff the amount of severance pay plaintiff was requesting. Needless to say, none of those things were ever accomplished. It was at this point that plaintiff filed the suit now before us.

After the dismissal of Rodriguez-Estrada and the appointment of Lopez-Stubbe, plaintiff amended his suit to include Lopez-Stubbe. Plaintiff's primary assertion against Lopez-Stubbe is that as successor trustee he had an obligation to fulfill the promises made by Rodriguez-Estrada to the plaintiff. Kagan claims that he went to Lopez-Stubbe several times requesting back pay, a severance bonus, and letters of reference. He also asked him to remove the termination letter from his file. Lopez-Stubbe

refused to remove the letter or write plaintiff any letters of reference, but did offer to pay plaintiff the amount due him under Puerto Rico law. 29 LPRA sec 185a. Plaintiff links the refusal of Lopez-Stubbe to provide him with letters of reference with his inability to obtain employment for a number of years and with the fact that when he did find employment, it was at a substantially lower salary.

Plaintiff also links what he perceived as a cover-up effort on the part of Otero-Bigles and Lopez-Stubbe with the refusal to right the harm done to him by Rodriguez-Estrada. The complaint demonstrates that he felt Otero-Bigles was allied with Rodriguez-Estrada against him. And that the influence of Otero-Bigles over Lopez-Stubbe was the genesis of Lopez-Stubbe's

refusal both to bring suit and to refuse to fulfill Rodriguez-Estrada's promises to plaintiff. Plaintiff amended his complaint to include claims against Otero-Bigles after Otero-Bigles resigned as the attorney for the estate. The only evidence of a connection between Otero-Bigles which could support these theories is that Oter-Bigles represented Rodriguez-Estrada in the bankruptcy of Northwest Promotions, Inc. by replying to a motion filed against him by the Internal Revenue Service on August 11, 1985.

2. **The Procedural History**

Plaintiff's action for wrongful termination was filed relatively early in the history of the bankruptcxy. And while the demise of Rodriguez-Estrada was taking place, this action was wending a tortuos path through the judicial system.

When the case was originally filed on March 10, 1983, it was assigned to Bankruptcy Judge Hernandez. It was then reassigned to Bankruptcy Judge Beckerleg on November 23, 1983. At this point, the bankruptcy court ordered plaintiff to amend his complaint to account for the change of trustee. He amended to include Lopez-Stubbe as representing the estate on December 12, 1983. Judge Beckerleg denied plaintiff's request for punitive damages on August 10, 1984 in open court. Various motions by the different parties resulted in the transfer of the case to the US District Court on August 29, 1984, where it was assigned to Judge Acosta. Judge Acosta found that the bankruptcy court had indeed had jurisdiction over the various claims, but retained the case in district court so as to expeditiously resolve the matter. The case was then

transferred to this judge. In an order entered August 28, 1986, we vacated the previous order, dismissed the claim of slander against Rodriguez-Estrada without prejudice for lack of jurisdiction, and remanded the case to the bankruptcy court. At the bankruptcy court level, the case was reassigned to Judge de Jesus.

While Judge de Jesus is the judge from whom this appeal is taken, many other players have changed in the interim. Kagan's attorney withdrew on February 2, 1987. On February 6, 1987, Lopez-Stubbe informed Otero-Bigles that he must withdraw as the estate's attorney. Testimony in San Juan Hotel I by Kagan suggested a conflict of interest in Otero-Bigles' representation of Rodriguez-Estrada. On February 9, 1987, Otero-Bigles withdrew. Then, on April 4,

1988, Kagan amended his complaint to include Otero-Bigles.

The bankruptcy court began trial on May 24,1988, and then continued it in order for plaintiff to obtain counsel. The bankruptcy court also severed the trial of the charges against Rodriguez-Estrada from the trial of the charges against Lopez-Stubbe and Otero-Bigles. Plaintiff did not obtain counsel and trial resumed on September 11, 1990, with plaintiff representing himself pro se. The bankruptcy court dismissed all claims against Lopez-Stubbe and Otero-Bigles in open court on September 18, 1990, and allowed plaintiff damages under 29 LPRA sec 185a against the estate. On March 23, 1992, the bankruptcy court issued an opinion in which it stated its findings.

The bankruptcy court found that the district court had limited the inquiry by

the bankruptcy court to the determination of whether the former and successor trustee were liable for actions while acting in their official capacities. This precluded consideration of whether Otero-Bigles, his wife, and the conjugal partnership were personally liable to plaintiff on any of the stated causes of action. Next, it found that there was no evidence of an agreement between Rodriguez-Estrada and Kagan aside from Kagan's testimony. It found that under these circumstances, there was no way Lopez-Stubbe could be certain an agreement existed and so he was under no obligation to remove the letter. As Kagan was never his employee, he was under no obligation to write letters of reference. The bankruptcy court also found that there was no evidence of a cover-up or of a plan to harm Kagan. As to the issue of

whether Otero-Bigles has a conflict of interest under the code of professional responsibility leading to a violation of the bankruptcy code under 11 USC 327, the bankruptcy court found that it had no jurisdiction. It cited as reasons that (1) it could not decide questions relating to the rules of professional responsibility, and (2) that section 327 did not provide plaintiff with a remedy. The bankruptcy court found that plaintiff was entitled to damages under 29 LPRA sec 185a for wrongful dismissal, but that was his sole remedy.

II.

JURISDICTION

The source of our jurisdiction is that granted the district courts by Congress in 28 USC sec 1334. The jurisdiction of the bankruptcy court derives from the jurisdiction of the

district court; hence, there are two types of jurisdiction possible for bankruptcy courts under federal law: original and exclusive jurisdiction over title 11 cases under 28 USC sec 1334 (a), and original non-exclusive jurisdiction over civil proceedings arising under, arising in, or related to title 11 cases under 28 USC sec 1334 (b). In 1978, the bankruptcy system was restructured, giving more direct power to the bankruptcy courts over bankruptcy cases. The jurisdiction of the bankruptcy cases over the "arising under, arising in, or related to" cases created a constitutional conflict concerning the ability of non-Article III courts to have direct jurisdiction over claims not brought under the bankruptcy code. The Supreme Court found that "Congress may not vest in a non-artice III court the

power to ajudicate, render final judgment, and to issue binding orders in a traditional contract action arising under state law, without consent of the litigants and subject only to ordinary appellate review." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 US 50 (1982); see also Renne v. Geary, ____US____,111 S.Ct. 2331 (1991); Commodity Futures Trading Com. v. Schor, 478 US 833 (1986); Thomas v. Union Carbide Agricultural Products Co., 473 US 568 (1985). In other words, the bankruptcy court could not render a final decision in cases too distant from the jurisdiction allowed it by the bankruptcy statutes.

To correct the constitutional infirmities that resulted from the 1978 restructuring, Congress passed 28 USC sec 157 (a). Section 157(a) created a

distinction between what are termed core and noncore proceedings. Bankruptcy judges have the power to "hear and determine" core proceedings subject only to the review power of the district court. However, in the case of non-core proceedings, bankruptcy judges only have the ability to recommend. In re Corporacion de Servicios Medicos Hospitalarios de Fajardo, 805 F2d 440, 443 (1st Cir 1986). The language of section 157 specifically mentions "arising under" and "arising in" cases, leading to the conclusion that the statute did not intend to include "related" cases in the group that can be considered a core proceeding. Collier on Bankruptcy sec 3.01(2)(b)(ii) at 3-39 (1992); see in re Arnold Print Works, Inc., 815 F2d 165, 167 (1st Cir 1987). Related proceedings are "those civil

proceedings that, in the absence of bankruptcy, could have been brought in a district court or state court." Collier on Bankruptcy sec 3.01(1)(c)(iv) (citing *n re Colorado Energy Supply Inc.*728 F2d 1283 (1oth Cir 1984); see also In re Parque Forestal, Inc., 949 F2d 504, 509 (1st Cir 1991). This case, where plaintiff's action rests on a state claim of wrongful termination, is a related case. See in re Hudson Oil Co., 68 BR 735,741 (D.Kan 1986) (case holding that retaliatory dismissal is a related matter). Therefore according to the discussion above, the instant case, as a related case, is a non-core proceeding. Treating it as a non-core proceeding would mean that the bankruptcy court would have no power to issue a final order in this case. However, when this court remanded the case to the bankruptcy

court in its August 27, 1986 order, it gave the bankruptcy court the power to issue a final judgment. The language of the opinion clearly indicates that the district court intended the bankruptcy court to make a final decision.

However, there are some who hold the opinion that where the issue of the bankruptcy court's power to make a final judgment is not raised by the parties and the bankruptcy court enters a dispositive order, this constitutes a waiver of the right to raise the issue. Collier on Bankruptcy sec 3.01(2)(c) at 3-53 (1992). Essentially, courts treat the silence of the parties as acceptance of the bankruptcy court's jurisdiction. Collier on Bankruptcy sec 3.01 (2) (d)(i) at 3-59 & sec 3.01 (2)(d)(ii) at 3-62 (1992). See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 US 50 (1982),

where the Supreme Court was concerned with the jurisdiction of non-artice III courts in a situation where the parties had not agreed to submit to the jurisdiction of the non-article III couirt. In this case, the bankruptcy court entered a final judgment after we ordered it to make a final disposition, and neither of the parties objected. Therefore, the issue of whether jurisdiction is absent is non-existent. The bankruptcy court acted properly and the parties can have no objection to the district court exercising its function an an appeals court under 28 USC sec 158. As an appellate body, we may review conclusions of law, but findings of fact may only be set aside if clearly erroneous, where the court "is left with the definite and firm conviction that a mistake has been committed." US v. United

States Gypsum Co., 333 US 364 (1948); In re GSF Corp., 938 F2d 1467,1474 (1st Cir 1991); see Fed. R. Bankr. P. 8013.

III

STANDING

The above discussion settles the jurisdiction of this court over most of plaintiff's claims. However, Kagan's claim that Otero-Bigles falsely claimed to be a disinterested party and, therefore, violated 11 USC sec 327 must first pass another hurdle, namely whether the plaintiff has standing to bring claims of illegal behavior on the part of the estate's attorney. The bankruptcy court was clearly uncomfortable with its jurisdiction over the issue of Otero-Bigles' behavior. That the lack of a remedy was one of the reasons for the bankruptcy court's decision not to exercise jurisdiction over this portion

of plaintiff's complaint clearly points to some concern with standing.

We disagree with the bankruptcy court in that it does not have jurisdiction over the question of whether Otero-Bigles violated the requirement that he be a, "disinterested party." 11 USC sec 327. In re Martin, 817 F2d 175, 181 (1st cir. 1987) ("bankruptcy courts have been accorded wide discretion....in regard to the terms and conditions of the engagements of professionals"); see also In re AOV Industries, Inc., 797 F2d 1004,1010 (DC cir. 1986); In re Pierce, 809 F2d 1356,1363 (8th cir. 1987). An attorney submitting to the scrutiny of the bankruptcy court has a responsibility to disclose any potential conflicts of interest of which he knows. In re BH & P, Inc., 119 BR 35,43 (DNJ 1990), aff'd949 F2d 1300 (3rd cir 1991); In re Roberts,

75 BR 402, 410 (D. Utah 1987). The standard is whether an "actual" conflict exists. As argued by the plaintiff, a code of professional responsibility might be used to draw the outline of what constitutes a conflict. In re Lee Way Holding Co. 102 BR 616, 620-22 (SD Ohio 1988). So, in this case it might be found that the type of conflict envisioned by the code does include the representation of the former trustee. The exact nature of the conflict would certainly be a question for the bankruptcy court to consider.

However, such question need not be addressed any further. Kagan has no standing to litigate this particular aspect of his claim. What prompted the bankruptcy court's hesitancy was its uneasiness with the investigation of Otero-Bigles' representations to the

bankruptcy court in the context of a wrongful termination suit by plaintiff. Standing is a threshold issue in every federal case which requires the court to inquire whether the plaintiff has such a personal stake in the outcome of the controversy that he may invoke federal jurisdiction. American Postal Workers Union v. Frank, No. 91-1633, slip op. (1st cir. July 6, 1992); Warth v. Seldin, 422 US 940, 489-99 (1975). The First Circuit has established that a standing inquiry has three elements: "(a) litigant must 1, "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" and 2, that the injury "fairly can be traced to the challenged action" and 3, "is likely to be redressed by a favorable decision."" American Postal Workers Union v.

Frank,No. 91-1633, slip op. at 3; Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 US 464, 472 (1982). Plaintiff is a creditor under 11 USC sec 101(5), and this makes him a party in interest under 11 USC sec 1109. See generally In re Public Service Co., 88 BR 546,560 (Bankr N.H. 1988). However a party must be both a party in interest and have standing to bring suit in the name of the estate. When plaintiff sought to represent the estate in a suit against Rodriguez-Estrada, the court stated that, "Kagan had no standing to sue on behalf of the estate, and we believe his action properly could have been dismissed on that basis." In re El San Juan Hotel Corp., 841 F2d 6, 9 (1st cir. 1988). The circuit held that "where the assets of the estate have been diminished by the

trustee's actions, the representative of the estate is the proper party to assert claims against the trustee. Conversely, where the estate itself has suffered no loss but the actions of the trustee have directly harmed a creditor, it should be the creditor, not the estate that sues." In re San Juan Hotel Corp. 847 F2d 931, 938 (1st cir 1988) (citations omitted). Here, the injury could only be to the estate, since plaintiff is asserting injury to himself as an employee and not as a creditor.

Plaintiff alleges that Otero-Bigles' allegiance to Rodriguez-Estrada motivated him to oppose bringing suit against Rodriguez-Estrada and to influence Lopez-Stubbe to deny plaintiff's requests for severance pay and letters of reference. Our problem is with both the traceability and redressability prongs of the

doctrine. Tracing plaintiff's injury, i.e. his inability to get work after his termination, to Otero-Bigles' alleged misrepresentation is difficult. While it may be that the attorney representing the estate has influence on the trustee, the decision as to whether to provide plaintiff with compensation and letters of reference was soley the responsibility of the trustee, who was the successor of plaintiff's employer. Whether Otero-Bigles violated the bankruptcy code and the canons of professional ethics is unrelated to plaintiff's injury. This injury would be to the estate generally. While every injury to the debtor estate derivatively injures all creditors, including plaintiff, not every derivative injury will give the creditors generally the right to sue. The alleged injury done to the estate by Otero-Bigles' alleged

falsification has no direct impact on the plaintiff.

The plaintiff's injury would also not be redressed by the statute. The sole remedy under Section 327 would be to rescind the compensation Otero-Bigles received for his services. This remedy would do nothing to redress the wrongs claimed by the plaintiff. The only action which plaintiff could sustain against Otero-Bigles is a violation of Otero-Bigles' duty to plaintiff if such duty exists. Plaintiff's action under Section 327 of the bankruptcy code is dismissed for lack of standing.

IV.

DUTY OF SUCCESSOR TRUSTEE

The plaintiff argues that Lopez-Stubbe and Otero-Bigles have a fiduciary duty to compensate him for losses sustained as a result of his wrongful

termination. Lopez-Stubbe and Otero-Bigles have a fiduciary duty to the estate Commodity Futures Trading Com. v. Weintraub, 471 US 343, 352 (1985); In re Consupak, Inc., 87 BR 529 (ND Ill. 1988), for which they are personally liable. A trustee, indeed anyone with a fiduciary duty to the estate, may be personally liable for actions taken in the context of his trusteeship. Mosser v. Darrow, 341 US 267 (1951). The bankruptcy court found that Otero-Bigles could not be held personally liable based on the order entered by this court on August 26, 1986. However, the order of the district court was specifically directed to the claims against Rodriguez-Estrada for slander over which the court has no jurisdiction. This court does have jurisdiction over a claim concerning the fiduciary duties of the offices of the estate, of whom Otero-

Bigles is one. Therefore the bankruptcy court improperly excluded him from consideration. We, therefore, move to a consideration of the fiduciary duty of both the successor trustee and the estate's attorney.

It was the bankruptcy of the El San Juan Hotel which generated most of the law in this circuit on the issue of the fiduciary duties of a trustee. See in Re San Juan Hotel Corp., 847 F2d 931 (1st Cir 1988); Connecticutt General Life Ins. Co. v. Universal Ins. Co., 838 F2d 612, 621 (1st cir. 1988); In Re El San Juan Hotel, 809 F2d 151 (1st cir 1987). The trustee steps into the shoes of the management of the debtor. Commodity Futures Trading Com. v. Weintraub, 471 US 343, 352 (1985). As a manager, he has a responsibility to the shareholders and creditors, i.e. all parties who have an

interest in the estate. The estate's attorney also has a fiduciary duty to the shareholders and creditors. In re Consupak, Inc. 87 BR 529 (ND Ill. 1988). It is clear that both Lopez-Stubbe and Otero-Bigles owe a duty to the creditors of the estate to the extent that their interests rise and fall with the economic health of the estate. However, the nexus with which we are concerned in this case is not that between the fiduciary and the interests in the estate, but rather between employer and employee. Plaintiff bases his claim upon his reading of various provisions of the bankruptcy code and rules regarding the role of the trustee. We see no mention in these provisions or rules of anything which indicates that a successor trustee had any particular duty toward an employee who was discharged by the former trustee.

The employee/employer relationship is governed by state law. The essence of the employer/employee relationship in our system is the high degree of discretion allowed the employer. The decision to terminate an employee is a discretionary decision which is only circumscribed the limitations of state law. In Puerto Rico, the employment-at-will doctrine which is found in most states has been modified to offer the employee some protection. 29 LPRA sec 185. But that in no way creates any fiduciary duty on the part of the trustee in bankruptcy to an employee. The only duty the trustee has toward an employee is to act as a reasonable employer would act. Here, Lopez-Stubbe has acted as a reasonable employer. The bankruptcy context does not place any additional burden upon the trustee. A bankruptcy trustee may be personally

liable for negligent acts; however, only where "discretionary judgments are not involved." Connecticutt Gen. Life Ins. Co. v. Universal Ins. Co., 838 F2d 612, 621 (1st cir 1988). Although plaintiff's role in the exposure of the criminal activities of the original trustee, Rodriguez-Estrada, as acknowledged by this court was substantial, this creates no duty in the successor trustee.

Otero-Bigles, in his capacity as attorney for the estate, owes no duty to plaintiff, except insofar as plaintiff's wrongful termination suit gives him stqatus as a creditor. The legal counsel of the estate is not the employer and, therefore, has no duty to the employee of a bankrupt estate. Since we have determined that plaintiff here is suing not in his capacity as a creditor, but based on his status as an employee,

Otero-Bigles owes him no fiduciary duty. We do not reach the issue of the responsibility of Rodriguez-Estrada.

V.

PUBLIC POLICY EXCEPTION

The bankruptcy court found that the protection offered employees by Puerto Rico law was the sole remedy available to plaintiff and awarded him damages under the statute. Plaintiff argues that there should be a public policy exception to the employment-at-will doctrine where an employee is discharged in retaliation for his attempts to disclose the illegal actions of his employer. A "whistleblower" as plaintiff characterizes himself, has three possible sources for a cause of action against his employer: a judicially constructed state policy against such termination, state legislation protecting "whistleblowers"

or federal legislation protecting "whistleblowers." Unfortunately, none of those provide plaintiff with a cause of action.

In some states, a "whistle-blower" is protected by a public policy exception to the employment-at-will doctrine where he refuszes to participate in illegal or unethical acts. See Liability for Discharging At-Will Employee for Refusing to Participate in, or for Disclosing, Unlawful or Unethical Acts of Employer or Coemployees, 9 ALR 4th 329. Although there are states which have found there to be a public policy exception to the employment-at-will doctrine, that is not the case in Puerto Rico. The only exceptions to the application of section 185a in cases involving wrongful termination are: (1) if plaintiff is a member of a group protected by other

social legislation, (2) if plaintiff has an independent cause of action for a tort committed in the course of the discharge, or (3) if the termination of the plaintiff violated his constitutional rights. Arroyo v. Rattan Specialties, Inc., 117 DPR 35, 64 (1986). Here, plaintiff is not a member of a group specifically protected by legislation. And while plaintiff may have an independent cause of action for the tort of slander, that was dismissed by this court for lack of jurisdiction. Finally, although Arroyo v. Rattan Specialties Inc. does talk of public policy, it is the public policy that a worked should have adequate remedies to effectively vindicate his constitutional rights and not a more general public policy concerning the remedies of "whistleblowers." Plaintiff's cause of

action is not based upon a violation of his constitutional rights.

Some states have specifically enacted legislation which protects "whistleblowers." Prior to July 3, 1986, at the time when plaintiff was discharged, Puerto Rico did not provide any statutory protection for "whistleblowers." The law at the time only allowed statutory relief for those employees discharged without just cause. 29LPRA sec 185a-1851. Section 185a has been found to be the exclusive remedy for wrongful termination under Puerto Rico law. Rodriguez v. Eastern Airlines, Inc., 816 F2d 24 (1st cir 1987); Weatherly v. International Paper Co., 648 F. Supp 872, 877 (DPR 1986); Vargas v. Royal Bank of Canada,604 F.Supp 1036 (DPR 1985); Rivera v. Security National Life Ins. Co., 106 DPR 517,527 (1977). It is for that reason

that the law was amended to specifically allow some remedy for "whistleblowers." 29 LPRA sec 185b.

In the federal context, only those statutes which explicitly provide for the protection of a "whistleblower" create a cause of action for wrongful termination. Note, Protecting Employees at Will Against Wrongful Discharge: the Public Policy Exception,. 96 Harv. L.R. 1931, 1934 (1983). Plaintiff maintains that a public policy exception should emanate from federal common law, since the actions for which he was terminated, prevented illegal actions by a trustee, protected the integrity of the bankruptcy code. However, while plaintiff's actions may have resulted in the prosecution of the trustee for violations of the bankruptcy code, the code itself does not provide for the protection of employees

who were fired as a result of efforts to prevent illegal actions. Unless the plaintiff can point to some portion of the bankruptcy code which specifically allows the employees of a bankrupt estate more rights than allowed by the at-will employment doctrine, plaintiff has no cause of action. Plaintiff has not done so. We, therefore find that the bankruptcy court correctly found that plaintiff's only basis for recovery was section 185a.

VI.

CONCLUSION

Although we have expressed some fundamental disagreement with some aspects of the bankruptcy court's decision, we agree with the ultimate result that plaintiff's only basis for recovery was 29LPRA sec 185a. On that

basis, we **AFFIRM** the disposition made by the bankruptcy court.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 29th day of December, 1992.

JOSE ANTONIO FUSTE

U. S. District Judge

(3)

Supreme Court, U.S.
FILED
MAR 10 1994
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No. 93-1274

In the Supreme Court of the United States

OCTOBER TERM, 1993

MARSHALL J. KAGAN,
PETITIONER,

v.

EL SAN JUAN HOTEL CORP.,
HANS LOPEZ STUBBE AND
RODRIGO OTERO BIGLES,
RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS EL SAN JUAN HOTEL CORP. and HANS LOPEZ STUBBE

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I. QUESTIONS PRESENTED FOR REVIEW — MISSTATEMENTS CONTAINED THEREIN

In compliance with this Honorable Court's Rule #15 the appearing party addresses misstatements in the Questions Presented For Review by Mr. Marshall J. Kagan, petitioner herein, acting pro se. These statements have a repercussion on the question of the issues properly presented before the court.

Petitioner states that in this case an employee of a company operating under bankruptcy law, himself, discovers that the *trustees* and *their attornies* [sic] *are* corrupt criminals, stealing from the estate, and protecting each other. Mr. Kagan further states that he had *them* removed from office, charged, convicted, and in one case imprisoned for *their* wrongdoing and that in retaliation *they* fired him and blackballed him, preventing him from working for several years.

The appearing party specifically states that there has *never* been any criminal actions instituted against the successor trustee Hans Lopez Stubbe nor against his former attorney Rodrigo Otero Bigles who are the parties in this cause of action. At no time has there been an allegation, evidence or finding of fact relating to any criminal activity by these two co-defendants; therefore Mr. Kagan's statement that Hans Lopez Stubbe and Rodrigo Otero Bigles have been charged and convicted for criminal acts constitutes a gross misstatement of fact.

Also Petitioner wrongfully expresses that he had them, referring to, once again, the successor trustee (Hans Lopez Stubbe) and Rodrigo Otero Bigles (former trustee's attorney), removed from office. The appearing party specifically indicates that said statement constitutes a misstatement of fact since Hans Lopez Stubbe *is still* the trustee of the bankrupt estate, he was never removed or convicted or even charged with any criminal acts, and neither was his attorney, Rodrigo Otero Bigles. However, the former trustee, Hector Rodriguez Estrada, who is not a party in this appeal, the original trustee,

was convicted and removed from office and is now serving an eighteen (18) year sentence. Petitioner obtained also a default judgment in the instant case against said original trustee.

Furthermore, petitioner Kagan states that in retaliation they, referring also to former trustee, successor trustee and his former attorney, fired him preventing him from working for several years. The appearing party specifically indicates that this is a misstatement of fact referring to Hans Lopez Stubbe and to his former attorney Rodrigo Otero Bigles since Mr. Kagan was dismissed from his position *before* Mr. Hans Lopez Stubbe was appointed trustee of the estate and before Mr. Bigles was the lawyer for the estate. Thus, Mr. Hans Lopez Stubbe and Mr. Bigles could not possibly have dismissed Petitioner from employment.

The appearing party very respectfully prays this Court to refer to the factual background of this case as found by the Bankruptcy Court, the District Court, and as later summarized by the Circuit Court. (See Petitioner's Appendix and Supplemental Addendum wherein the District Court and Circuit Court judgments are included and Respondents' Appendix pp. 15-26 for the Bankruptcy Court Opinion and Order). We further emphasize that the bankruptcy trial judge specifically made a finding exonerating the successor trustee, Mr. Hans Lopez Stubbe of ever participating in any "cover up" activities. (Resp. Appendix p. 24).

A. *Questions that would properly be before the court.*

Although the appearing party emphatically sustains that certiorari in the instant case should not be granted, we state the questions that would properly be before this Honorable Court.

1. If petitioner's claim for damages against the successor trustee Hans Lopez Stubbe and the lawyer for the estate, in their personal capacity, is not barred since under Puerto Rican employment law, law applicable to this employment matter,

the exclusive remedy for a claim as made by appellant is the one provided by State Law Act No. 80 of May 30 of 1976, 29 LPRA §185a-1851, as found by the Bankruptcy Judge, the District Judge and the Circuit Court.

2. If a successor bankruptcy trustee and his attorney had any legal duty to provide references regarding Petitioner, ex-employee of the bankruptcy estate, notwithstanding that the successor trustee and the lawyer did not have any personal knowledge of Petitioner's work habits and notwithstanding that there is no state law requiring the provision of references.

3. If a successor trustee and his attorney's fiduciary duties to the bankrupt estate extend to an ex-employee seeking damages for acts of a former trustee.

4. If this Court should formulate a federal common law remedy to redress plaintiff where Congress has not acted.

TABLE OF CONTENTS

	Page
I. QUESTIONS PRESENTED FOR REVIEW — MISSTATEMENTS CONTAINED THEREIN ...	i
A. Questions that would properly be before the court	ii
II. STATEMENT OF THE CASE	1
A. Re-statement of Facts	1
B. Course of the Proceedings	3
III. DECISIONS BELOW	6
A. Disposition in District Court	6
B. Disposition in Circuit Court	7
IV. ARGUMENT	9
V. REASONS FOR DENYING THE WRIT	10
A. Factual Misstatements	10
B. The Alleged conflict of circuits	11
C. Bankruptcy is Federal Interest as to the Administration of the Estate	14
CONCLUSION	15

TABLE OF AUTHORITIES

Case Law

United States

Page

Alvardo Morales v. *Digital*, 843 F.2d 613 (1st Cir. 1988) 11
Amato v. *Western Union Intern, Inc.*, 773 F.2d 1402 (2nd Cir. 1985) 12, 14
Ana Bonelli de Pujol v. *Shearson American Express*, 90 D.C.O. 127 (D.C.P.R. 1990) 12
Bahamundi v. *American Airlines, Inc.*, 7070 F. Supp. 79 (D.C.P.R. 1989) 11
Banco Nacional de Cuba v. *Sabbatino*, 84 S.Ct. 923 (1964) 13
Barany v. *Buller*, 670 F.2d 726 (7th Cir. 1982) 13
Board of Regents v. *Roth*, 408 U.S. 564 (1972) .. 12, 14
Garcia v. *American Airlines, Inc.*, 673 F. Supp. 63 (D.C.P.R. 1987) 11
Gonyea v. *Motor Parts Fed. Credit Union*, 7 IER Cases 539 (Mich. Court of Appeals 1991) 10
In re Gibbons, 52 B.R. 861, 863 ..... 12, 14
In re Goerg, 844 F.2d 1562 *cert. den* 109 S.Ct. 850 (11th Cir. 1988) 14
In re Grieves, 81 BR 912 (1987) 12, 14
In re Martin, 817 F.2d 175 (1st Cir. 1987) 6
In re TCI Ltd., 769 F.2d 441 (7th Cir. 1985) 14
Johnson v. *First Nat. Bank of Montevideo*, 719 F.2d 270 *cert. den.* 465 U.S. 1012, 1045 S.Ct. 1015, 79 L.Ed. 2d 245 (1983) 12, 14
Lugo v. *Matthew Bender & Co.*, 579 F. Supp. 638 (D.C.P.R. 1984) 11
Matter of Roach, 824 F.2d 1370 (3rd Cir. 1987) 14
Nasuti v. *Scondell*, 792 F.2d 264 (1st Cir. 1986) . 12, 14
Ridenour v. *Andrews Federal Credit Union*, 897 F.2d 715 (1990) 13
Rodriguez v. *Eastern Airlines*, 816 F.2d 24 (1st Cir. 1987) 11

Page

Valle v. *J.C. Penney, Inc.*, 704 F. Supp. 329 (D.C.P.R. 1988) 11

Vargas v. *Royal Bank of Canada*, 604 F. Supp. 1036 (D.P.R. 1985) 11, 12

Warren Brothers Company v. *Cardi Corporation*, 471 F.2d 1304, 1307 (1st Cir. 1973) 12, 14

Weatherly v. *International Paper*, 648 F. Supp. 872 (D.C.P.R. 1986) 11, 12

White v. *General Motors*, 908 F.2d 669 (10th Cir. 1990) 9

Puerto Rico

Diaz v. *Secretario de Hacienda*, 14 T.P.R. 1115 (1983) 10

Garcia Pagan v. *Shiley Caribbean*, 88 JTS 101 (1988) 11

Guardiola v. *Perez Moran*, 14 T.P.R. 613 (1988) 10

Industria Lechera v. *Secretario de Hacienda*, 95 PRR 819 (1968) 10

Ocasio v. *Diaz*, 88 P.R.R. 658 (1963) 10

Porto v. *Bentley*, 92 JTS 175 (1992) 9, 11

Rivera v. *Security National Life Ins. Co.*, 6 TPR 727 (1977) 11

Rodriguez v. *Comision Industrial*, 91 D.P.R. 434 (1969) 10

Santiago v. *Kodak*, 92 JTS 11 9

Puerto Rico Statutes

Act No. 65 of July 3, 1986, 29 LPRA §185(b) ... 10, 11

Act No. 80 of May 30, 1976, 29 LPRA §185a-1851 3, 4, 6, 7, 9, 11

Civil Code of Puerto Rico, Article 3, 31 LPRA §3 ... 10

Page

Miscellaneous

60 ALR 3rd 1080 9
Bankruptcy Code §327 ..... 2, 6
Bankruptcy Code §107, 704 and 1106(a) 8
California Labor Code §1055 9
Defamation In The Workplace: The Impact of Increasing Employer Liability, 72 Marq. L. Rev. 264 (1989) 10
Duffy, *Defamation and Employer Privilege*, 9 Employee REL. L.J. 444 (1983) 10
Indiana Stat. §22-6-3-1 9
Lewis, Ottley & Mersol, *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. Rev. 797 (1989) 10
Martin & Bartol, *Potential Libel and Slander Issues Involving Discharged Employees*, 13 Employee REL. L.J. 43 (1987) 10
Missouri Rev. Stat. §290.140 9

In the
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No. 93-1274

OCTOBER TERM, 1993

MARSHALL J. KAGAN,
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v.

EL SAN JUAN HOTEL CORP.,
HANS LOPEZ STUBBE AND
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RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS EL SAN JUAN HOTEL CORP. and HANS LOPEZ STUBBE

II. STATEMENT OF THE CASE

A. *Re-Statement of Facts*

As described below, the factual situation in the case at bar is different than indicated by petitioner. Petitioner herein, Marshall J. Kagan, was the comptroller of the bankrupt estate of El San Juan Hotel Corporation at the time Hector Rodriguez Estrada was appointed as Trustee of said estate. Kagan, having worked for the bankrupt estate for less than a year was dismissed by Rodriguez Estrada on December 30,

1982 for alleged unsatisfactory performance. Several months after he was terminated, Mr. Kagan testified before the House of Representatives of Puerto Rico.[1] On March 24, 1983 the Bankruptcy proceedings were converted to Chapter VII; the Hotel thus was permanently closed. Mr. Rodriguez Estrada was finally removed from his office on September 1983. Ten months after petitioner's termination, on October 31, 1983 Mr. Hans Lopez Stubbe was appointed Successor Trustee. Shortly thereafter Kagan urged Lopez and Otero, Successor Trustee's attorney, to file suit against Rodriguez. A request they refused based on the information available to them at that time. Otero Bigles' opinion was that at the time there was insufficient evidence to sustain an action on their part against Rodriguez Estrada. It was not that they were exonerating Rodriguez Estrada from any misconduct.

Contrary to petitioner's statements, Rodrigo Otero Bigles resigned as counsel at Mr. Lopez's request and not because they were both summoned to court and ordered to do so. (Resp. Appendix at p. 89-90). All lower courts have correctly and accurately determined that Otero had no conflict of interest in violation of section 327 of the Bankruptcy Code on which responsibility could be imposed in favor of Kagan.

Kagan requested from Hans Lopez reinstatement, severance pay and damages and further demanded that Lopez rectify his termination letter and instead prepare letters of recommendation, notwithstanding that the successor trustee was not his employer, all this pursuant to an alleged agreement which Kagan had reached with the original trustee Rodriguez Estrada. Kagan claimed that he was dismissed in retaliation for his attempts to have the trusteeship of Rodriguez Estrada investigated and that he should be compensated by the estate

[1] Petitioner implies that he was terminated after testimony at the House of Representatives. The fact is that he testified after termination. Mr. Kagan was terminated on December 29, 1982 (Resp. Appendix p.16) and the testimony in the State Legislature was provided in February 1983 (Resp. Appendix pp. 7-8 deposition of Mr. Kagan).

for the alleged harm he suffered because of the dismissal ordered by the original trustee, Rodriguez Estrada.

Mr. Lopez, as Successor Trustee, agreed to settle the severance pay ordered by law but refused to recommend the estate to proceed to make any payment beyond what is established by the Puerto Rican severance statute, 29 LPRA 180 et. sec. Furthermore, the reinstatement remedy could not proceed due to the fact that the hotel had filed Chapter VII proceedings prior to the appointment of Mr. Lopez as trustee.

B. *Course of the Proceedings*

This case was initially filed in the Bankruptcy Court as an adversary proceeding on March 10, 1983. The original defendants were the estate of the San Juan Hotel Corporation and former Trustee Hector Rodriguez Estrada. The allegations made therein were of wrongful dismissal and slander.

Various causes of action filed against Rodriguez Estrada in his personal capacity were dismissed by the Bankruptcy Court nine months after the filing of the complaint in an order which stated that the actions were directed at Rodriguez Estrada in his official capacity. (See Resp. Appendix p. 1). The Judge also directed plaintiff to file an amended complaint as to his cause of action for slander. The Complaint was also amended to include defendants Hans Lopez Stubbe and Rodrigo Otero Bigles as well as their wives and conjugal partnerships in their personal capacities. Rodriguez Estrada moved the Court to dismiss the action against him in his personal capacity. The issue was considered by the District Court which finally rendered a Memorandum Opinion and Judgment on August 27, 1986 dismissing the libel and slander complaints against Lopez Stubbe and Rodriguez Estrada, signed by Hon. Judge Jose A. Fuste. Said Judgment was not appealed. (See Resp. Appendix p. 4).

In the Memorandum Opinion and Judgment the District Court held that the cause of action for slander was dismissed

for lack of jurisdiction and that the remaining proceedings against former trustee Rodriguez Estrada and successor trustee Lopez in their official capacities as well as against the Hotel San Juan Corporation were to be remanded to the Bankruptcy Court. That judgment was never appealed and is hence final.

The trial of the case commenced on May 24, 1988. The proceedings were halted because of petitioner's lack of counsel.[2]

Much later the trial was started once again, Petitioner continuing pro se, before Bankruptcy Judge Sara De Jesus on September 11, 1990. At the beginning of the trial, the Court issued a ruling dated September 11, 1990 excluding the defendants therein, trustee Hans Lopez Stubbe and his attorney Otero Bigles, their wives and conjugal partnerships from any personal liability, since the court was precluded from holding contrary to Hon. Judge Fuste's order dated August 27, 1986 (See Resp. Appendix pp. 4-6). On September 17, 1990, a partial final judgment was entered, wherein the Court granted severance payment to Petitioner pursuant to Local State Law, Act 80 of 1976, 29 LPRA 185a et sec., and dismissed the claim for libel and slander based principally on the reasons set forth by Hon. Judge Jose A. Fuste in his Memorandum Opinion and Judgment of August 27, 1986. Judge De Jesus further denied Kagan's request for punitive damages for the reasons stated by Hon. Judge Beckerleg in his order of November 16, 1984, see Appendix pp. 1-3 and pp. 11-12. The trial was continued until its conclusion on September 12, 1990. No appeal was made from the partial final judgment entered by Hon. Judge De Jesus dated September 17, 1990.

On March 22, 1992 the Bankruptcy Court issued its opinion and order dismissing the causes of action against Hans Lopez Stubbe and Rodrigo Otero Bigles. Mr. Kagan has alleged in

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[2] During the Hearing on May 25, 1988, the Court concluded that the case could not continue with Kagan representing himself pro se because the Court could find itself compromising its impartiality.

Petitioner herein Kagan had, at that time, already terminated attorney-client relationships with at least three legal representatives.

his petition that there are still two motions (Motion to Disgorge Legal Fees and Motion to Remove Trustee) pending resolution by Hon. Judge De Jesus. However, those motions were addressed by the Judgment of the Bankruptcy Court dated March 22, 1992 and confirmed by Hon. Judge Fuste's opinion dated December 29, 1992; hence both motions are now moot. This constitutes a further misstatement of procedural matters.

In its Opinion the Bankruptcy Court made the following findings:

1. Successor Trustee Hans Lopez Stubbe had no obligation to rectify the letter of dismissal which was sent to Appellant by former trustee Rodriguez Estrada nor was he obligated to provide appellant with any letters of recommendation or references.

2. There was no record of the purported agreement wherein Kagan's letter of termination was to be expunged and Petitioner was to be provided with letters of recommendation.

3. Lopez Stubbe could not provide references for Kagan since he did not have personal knowledge of his performance and there was no legal duty to provide such references. See Appendix at pp. 24-25.

4. The Court found no evidence on which to sustain the allegations of a "cover-up" by Trustee Lopez Stubbe and Otero Bigles of the former Trustee Rodriguez Estrada's illegal actions. Appendix at pp. 24, 25.

5. There was no jurisdiction of the Bankruptcy Court on which it could "entertain questions concerning an attorney's violation of the rules of professional conduct".[3]

[3] Mr. Kagan has claimed that attorney Rodrigo Otero Bigles did not comply with said rules for he was allegedly performing legal services for an estate handled by trustee Lopez in the instant case and at the same time that he served as attorney for an estate handled by trustee Rodriguez Estrada in a different Bankruptcy case, therefore, having an alleged conflict of interest.

6. Plaintiff's exclusive remedy for alleged consequential damages due to termination was the severance payment under local State Law Act No. 80 of 1976, 29 LPRA 185a et seq.

The Court then proceeded to dismiss the remaining causes of action against all codefendants except Mr. Hector Rodriguez Estrada in his professional capacity as former trustee.

Mr. Kagan filed an appeal from the Bankruptcy Court's disposition in the District Court. The District Court entered its Judgment and Opinion and Order on December 29, 1992, confirming the Bankruptcy Court's Opinion. An appeal to the Circuit Court followed, which then confirmed the District Court opinion. The present Petition for Certiorari before the Supreme Court followed, which is now the object of this opposition.

III. DECISIONS BELOW

A. *Disposition in District Court*

In the Opinion of the District Court, the Judge dismissed Petitioner's cause of action under section 327 of the Bankruptcy Code, that counsel Otero Bigles falsely claimed to be a disinterested party, for lack of standing.[4] He expressed that the injury could only be to the estate and petitioner herein is claiming injury to himself as an employee and not as a creditor.

The Court further expressed that there was lack of causal relationship relating to the alleged claim of conflict of interest against Otero Bigles and petitioner's alleged damages: "Our

[4] Hon. Judge Fuste disagreed with the Bankruptcy Court that the Court lacked jurisdiction over the question of whether Otero-Bigles violated the requirement that counsel be a "disinterested party" for in *In Re Martin*, 817 F.2d 175, 181 (1st Cir. 1987) it was expressed that "bankruptcy courts have been accorded wide discretion . . . in regard to the terms and conditions of the engagement of professionals."

problem is with both the traceability and redressability prongs of the doctrine. . . . Tracing plaintiff's injury, i.e. his inability to get work after his termination, to Otero Bigles' alleged misrepresentation is difficult." See Hon. Judge Fuste's Opinion and Order See Petitioner's Appendix at pp. 34-35.

On plaintiff's lack of standing the District Court stated that it had jurisdiction over a claim concerning the fiduciary duties of the officers of the estate. The court correctly stated that the trustee and his attorney do have a fiduciary duty to the shareholders and creditors but however the Court found no application of that principle to Marshall J. Kagan's claim since the case at bar was not that of a creditor nor shareholder but of an ex-employee. As the Court pointed out, the nexus with which it was concerned in this case was not that between the fiduciary and the interests in the estate, but rather that between employer and employee *which is a relationship governed by state law*.

Relating to plaintiff's labor claim of consequential damages due to termination, the court, knowledgeable in Puerto Rican employment law, which is the law applicable to the case at bar, rejected plaintiff's public policy exceptions to the employment-at-will doctrine and stated, once again that plaintiff's exclusive remedy was recovery under Act No. 80 of 1976, 29 LPRA 185a et sec.

B. *Disposition in Circuit Court*

The Circuit Court entered its opinion on September 9, 1993, affirming the District Court Opinion. The opinion determined that Kagan had shown no basis for even inferring that either Lopez Stubbe or Otero Bigles had a legal duty to correct his references which had not been given by them, but by the former trustee ten months before Lopez Stubbe and Otero Bigles arrived on the scene. The Court also found that even assuming Lopez Stubbe and Otero Bigles were employers

of Kagan, codefendants were under no obligation to provide any references under State Law to him and that, therefore, it could not see why they should be required to provide corrected ones. The Court further expressed that Lopez Stubbe's and Otero Bigles' fiduciary duties to the bankrupt estate and to its creditors do not extend to Kagan, who is seeking damages as a former employee of the estate.

In relation to Kagan's claim that Lopez Stubbe and Otero Bigles harmed him by providing false references the Court stated that said claim was not raised below and, therefore, was not properly before the Court and that in any event Kagan admitted that he never sought any references from them for a prospective employer, a fact which made his claim devoid of merit.

The Circuit Court also found without merit Kagan's reliance on §§ 107, 704 and 1106(a) of the Bankruptcy Code to sustain that the trustee had a duty to provide proper references and/or to correct them. The Court accurately concluded with respect to said matter that: "(1) any duty under the Bankruptcy Code to prevent the dissemination of defamatory material is imposed on the court not the trustee; (2) the allegedly defamatory letter is not a 'paper filed' in a bankruptcy case; and (3) as noted above, Kagan concedes that the letter was never disseminated."

In relation to Kagan's assertion that he is entitled to relief under federal common law the Court expressed, among other reasons, that the instances in which a federal court has the authority to formulate a federal common law remedy are "few and restricted", that absent some statutory authorization to formulate substantive rules of decisions the court could not create a federal common law remedy, and that in this case it was not "necessary to protect unique federal interests".

IV. ARGUMENT

The appearing party's position regarding petitioner's claim has consistently been that Mr. Kagan's dismissal by Mr. Rodriguez Estrada, former trustee, was not justified pursuant to State Law and that, therefore, the existing remedy for unjust dismissals under Puerto Rican law applies. On Mr. Kagan's claim that Mr. Lopez Stubbe and his former attorney Otero Bigles refused to correct the record of the dismissal and give Kagan proper references, the appearing party has sustained and the courts have correctly determined that there is no legal obligation to provide references. Therefore, the exclusive remedy available to Mr. Kagan is the one provided by State Law Act. No. 80 of May 30, 1976, 29 LPRA § 185a-185l and its case law.[5]

Mr. Kagan intends to portray that he has an independent cause of action for defamation in employment without complying with the required standard of proof and regardless of the fact that the type of information provided which is claimed as the cause of action is privileged under labor/libel law.[6] Furthermore said cause of action was adjudged, decreed, dismissed and was not appealed.

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[5] Also on this issue it is important to state that there is no obligation for an employer to provide an employee with references regarding his job performance. See *Santiago* v. *Kodak*, 92 JTS 11 Resp. Appendix pp. 27-46. Also different from other states, there is no obligation for the employer to provide the employee a letter of dismissal. See for example California Lab. Code § 1055, Indiana Stat. § 22-6-3-1 and Missouri Rev. Stat § 290.140.

[6] One of the elements of the cause of action for defamation in employment is publication. *Porto* v. *Bentley*, 92 JTS 175 p. 10249, Resp. Appendix pp. 47-79. See also *White* v. *General Motors*, 908 F.2d 669 (10th Cir. 1990) where a discharged employee failed to state a claim for slander based on alleged negative job reference since he failed to introduce specific evidence of what was said, by whom and to whom. Furthermore, it has been stated that there is a need to promote the free flow of communication which requires the existence of the privilege. Among the communications which are considered privileged are the ones made to prospective employers informing the reasons for the dismissal. See Annot., 60 A.L. R.3d 1080

On the other hand, petitioner herein has failed to demonstrate that he is a "whistle-blower" under the applicable Puerto Rican statute since, in the first place, Act No. 65, the local Whistle-Blower Act (29 L.P.R.A. §185(B)), was enacted on July 3, 1986, three years after the fact, and is therefore not applicable to petitioner since substantive statutes under Puerto Rican law have no retroactive effect unless specifically indicated by the statute.[7] Second, even if Act No. 65 was retroactive Mr. Kagan does not qualify for its application since the act applies to an employee's collaboration with or to the expressions made by him regarding his employer's business prior to the employee's dismissal and Mr. Kagan's testimony before the legislature occurred *after* his dismissal.

A detailed examination of the Circuit Court's opinion and of the lower courts opinions (Bankruptcy and District) based upon issues of state law, leads to the conclusion that those courts gave full consideration to the issues presented and decided them correctly: they followed an unbroken line of authority.

V. REASONS FOR DENYING THE WRIT

A. *Factual Misstatements*

If this most Honorable Court were to grant the petition requested by Mr. Kagan it would be on action based upon

(1974); Duffy, *Defamation and Employer Privilege*, 9 Employee REL. L.J. 444 (1983); Martin & Bartol, *Potential Libel and Slander Issues Involving Discharged Employees*, 13 Employee REL. L.J. 43 (1987); *Defamation In The Workplace: The Impact of Increasing Employer Liability*, 72 Marq. L. Rev. 264 (1989); Lewis, Ottley & Mersol, *Defamation and The Workplace:* A Survey of the Law and Proposals for Reform, 54 MO. L. Rev. 797 (1989); and *Gonyea* v. *Motor Parts Fed. Credit Union*, 7 IER Cases 539 (Mich. Court of Appeals 1991).

[7] See Article 3 of the Civil Code of Puerto Rico, 31 LPRA 3; *Guardiola* v. *Perez Moran*, 14 TPR 613 (1983); *Diaz* v. *Secretario de Hacienda*, 14 TPR 1115 (1983); *Ocasio* v. *Diaz*, 888 PRR 658 (1963); *Industria Lechera* v. *Secretario de Hacienda*, 95 PRR 819 (1968); *Rodriguez* v. *Comision Industrial*, 97 DPR 437 (1969).

the presentation of an erroneous factual situation. The facts of the case are different from the facts expressed in the petition.

First of all, Mr. Kagan was dismissed from his employment at the El San Juan Hotel Corp. by the former trustee Hector Rodriguez Estrada *before* Mr. Kagan appeared to testify at the House of Representatives of Puerto Rico. Hector Rodriguez Estrada could not retaliate for testimony not having been provided by Mr. Kagan. The state 'whistle-blowers' statute, Act No. 65 of July 3, 1986, 29 LPRA § 185(b), is not applicable to this situation because Petitioner blew the whistle after he was terminated. Even if the facts had occurred as wrongfully narrated by Mr. Kagan, the whistle-blowers statute would not apply because it was enacted on *July 3, 1986*, three years after the fact, the law having no retroactive effect.

B. *The Alleged Conflict of Circuits*

The Court of Appeals for the First Circuit Opinion is fully in accord with the pertinent state law and state public policy. In its per curiam opinion the Circuit Court arrived at the correct result based on the overwhelming unanimity existing in Puerto Rico on the issue that State Law 80 of 1976, 29 LPRA 185 et. seq. is the exclusive remedy under the facts of the case and that this case did not present issues nor facts to depart from the exclusive remedy doctrine. See *Porto* v. *Bentley*, 92 JTS 175 pp. 10246-7, Resp. Appendix pp. 47-79; *Garcia Pagan* v. *Shiley Caribbean*, 88 JTS 101, 1988; Resp. Appendix p. 82-98; *Rivera* v. *Security National Life Ins. Co.*, 6 TPR 727 (1977); *Rodriguez* v. *Eastern Airlines*, 816 F.2d 24 (1st Cir. 1987); *Alvarado Morales* v. *Digital*, 843 F.2d 613, 615 n.1 (1st Cir. 1988); *Lugo* v. *Matthew Bender & Co.*, 579 F.Supp. 638 (DCPR 1984); *Vargas* v. *Royal Bank*, infra; *Weatherly* v. *International Paper*, infra; *Garcia* v. *American Airlines Inc.*, 673 F.Supp. 63 (DCPR 1987); *Valle* v. *J.C. Penney, Inc.*, 704 F. Supp. 329 (D.C.P.R. 1989); *Bahamundi* v. *American*

Airlines, Inc., 707 F.Supp. 79 (D.C.P.R. 1989); and *Ana Bonelli de Pujol* v. *Shearson American Express*, 90 D.C.O. 127 (D.C.P.R. 1990).

The alleged intercircuit conflict is also distinguishable on the facts and on the applicable law. In relation to the applicable law it is clear that Mr. Kagan's alleged claim arises from a situation which is absolutely governed by state not federal law: an employment relationship. When Mr. Kagan claims that the estate is liable what he is asserting is the employer-employee relationship existing between the bankrupt estate of El San Juan Hotel Corp. and himself.

It is a principle of law that when federal courts face issues of state law they are forced to apply the legal and public policy principles embodied in the pertinent local statute — See *Vargas* v. *Royal Bank of Canada*, 604 F.Supp. 1036 (D.P.R. 1985) and *Weatherly* v. *International Paper*, 648 F.Supp. 872 (D.C.P.R. 1986). *Warren Brothers Company* v. *Cardi Corporation*, 471 F.2d 1304, 1307 (1st Cir. 1973) and see also *In re Gibbons*, 52 B.R. 861, 863. See *In re Grieves*, 81 BR 912 (1987); *Johnson* v. *First Nat. Bank of Montevideo*, 719 F.2d 270 cert. den. 465 U.S. 1012, 1045 Ct. 1015, 79 L.Ed.2d 245 (1983). *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); *Amato* v. *Western Union Intern Inc.*, 773 F.2d 1402, 1405 (2nd Cir. 1985); *Nasuti* v. *Sconell*, 792 F.2d 264 (1st Cir. 1986). It is logical then that there had to be differences among the circuits with respect to this matter since in the majority of the cases they are applying different state law embodying different public policies. The states have different legislative bodies which enact different labor statutes with different public policies in mind. This fact definitely has an effect upon the decisions of the federal courts applying state law.

In other words, the existing differences among the Circuits are perfectly and logically accounted for and do not in reality constitute basis for the granting of the petition.

Mr. Kagan intends to characterize his claim as one which needs redress under unique federal interests. Petitioner cites the case of *Banco Nacional de Cuba* v. *Sabbatino*, 84 S.Ct. 923, 939 (1964) alleging that the case at bar started in the Bankruptcy Court and the Bankruptcy Court is exclusively a federal creation. However, in *Banco Nacional de Cuba* there were questions of international law which are definitely of federal interest.

The fact that the bankruptcy system controls "finances of thousands of large businesses, and of hundreds of thousands of individuals, and its staffing by federal personnel" definitely does not make the case at bar worthy of designation as a "unique federal interest" as the alleged federal credit union regulatory system. Even if the instant case was worthy of the designation it does not mean that when dealing with matters of state employment law the bankruptcy court will create federal public policy especially if there is no federal statute.

The intercircuit conflict claimed by Petitioner is also distinguishable from the case at bar in terms of the facts of the case because Mr. Kagan testified before the House of Representatives of Puerto Rico after he was discharged. The cases cited by Petitioner are cases wherein the employees were active in employment when they committed the acts which gave place to their dismissals. See *Barany* v. *Buller*, 670 F.2d 726 (7th Cir. 1982), further, also contrary to the facts of the case, there was no remedy by applicable statute, *Ridenour* v. *Andrews Federal Credit Union*, 897 F.2d 715 (1990).

Thus, regardless of what other circuits might have mandated regarding other distinguishable cases under other factual situations it is clear that the First Circuit properly decided the instant case based on the applicable state law.

C. *Bankruptcy is Federal Interest as to the Administration of the Estate*

Although the federal bankruptcy law preempts state law *(In re Goerg*, 844 F.2d 1562 cert. den. 109 S.Ct. 850 (C.A. 11 1988)) on bankruptcy matters this does not mean that all federal public policy will apply even to underlying non-bankruptcy matters. The Bankruptcy Court, for instance, is not authorized to change the applicable state law on certain matters. See *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985). Furthermore, "the Bankruptcy Code was written with the expectation that it would be applied in context of state law and federal courts are not licensed to disregard interests created by state law when that course is not clearly required to effectuate federal interests." See *Matter of Roach*, 824 F.2d 1370 (3rd Cir. 1987).

Thus, in strict bankruptcy matters, the bankrutpcy code and its federal interest take precedence over state bankruptcy statutes but state law controls over underlying aspects like employment, contracts, property, damages, attachments etc. . . . *Warren Brothers Company* v. *Cardi Corporation*, supra and see also *In re Gibbons*, supra. See *In re Grieves*, supra; *Johnson* v. *First Nat. Bank of Montevideo*, supra. *Board of Regents* v. *Roth*, supra; *Amato* v. *Western Union Intern Inc.*, supra; *Nasuti* v. *Sconell*, supra.

CONCLUSION

For the foregoing reasons this most Honorable Court should deny the petition for writ of certiorari requested by petitioner.

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

B-80-00259 (A)
Chap. 7
ADVERSARY No. 83-0183

IN RE:
SAN JUAN HOTEL CORPORATION,
DEBTOR,
MARSHAL J. KAGAN,
PLAINTIFF,

v.

EL SAN JUAN HOTEL CORPORATION,
HECTOR RODRIGUEZ ESTRADA, TRUSTEE,
DEFENDANTS.

ORDER

This adversary proceeding was transferred to our consideration by order of the Hon. Antonio I. Hernandez Rodriguez of Nov. 17, 1983.

Our first intervention in this proceeding has been to hear the parties, after notice, on the motion to dismiss filed by co-defendant Hector M. Rodriguez Estrada.

On March 10, 1983, plaintiff filed his complaint against El San Juan Hotel Corp., a Chapter 7 debtor (hereinafter referred to as "defendant debtor" and Hector Rodriguez Estrada, Trustee, the trustee in the Chapter 7 case of the defendant debtor (hereinafter referred to as defendant Rodriguez). The complaint alleges jurisdiction under 28 USC 1471 and 1473 as an action against the debtor and the representative of the estate arising after the commencement of the case.

Three claims for relief are set forth. The first claims the defendant Rodriguez arbitrarily, negligently, and wrongfully dis-

missed plaintiff from his position as controller of defendant debt. The second claim is a claim for unjustified dismissal under 29 LPRA 185(a) - 185(j). The third claim is a claim for damages based upon allegedly slanderous and libelous statements concerning plaintiff allegedly made by defendant Rodriguez.

The answer of co-defendant Rodriguez denies most of the allegations, the jurisdiction, and the right to relief; the defendant debtor did not file, but as co-defendant Rodriguez was at that time the trustee of the case, and thus the representative of the debtor estate (#323), no separate answer was required.

After certain discovery, co-defendant Rodriguez moved to dismiss the complaint for lack of jurisdiction based on *Northern Pipeline* v. *Marathon*, 102 S.Ct. 2858 (1982). This is the motion we heard, and which we now consider; before doing so, however, we should note that co-defendant Rodriguez is no longer the trustee in this case having been replaced by Hans Lopez Stubbe; a motion by the new trustee to be substituted as the party in interest was granted Oct. 31, 1983.

Bankruptcy Rule 7025 makes applicable to adversary proceedings Rule 25 of F.R. Civ. P., which deals with substitution of parties, subject to the provisions of Rule 2012; Rule 2012 provides that when a trustee is removed during the pendency of a case, the successor is automatically substituted as a party in any pending proceeding. As trustee, co-defendant Rodriguez is no longer a party to this proceeding by virtue of the foregoing rules and by virtue of the aforementioned order of Oct. 31, 1983.

Is co-defendant Rodriguez yet a party in his individual or personal capacity? To answer this question, we must first determine whether he was sued in his official capacity, or in his personal capacity, or in both capacities.

As to the first two causes of action or claims, it is clear to us that co-defendant Rodriguez was sued in his official capacity. The nature of the alleged wrong, (dismissal from the position of controller of a trustee administered debtor),

and the nature of the relief requested (reinstatement, bonus, severance pay, reimbursement of expenses incurred as an employee, and dismissal pay) are typical of the wrongs attributed to and the relief claimed from the employer and not from the officer who carried out the dismissal, in cases of this type.

As to the third cause of action, plaintiff suggests that either or both the debtor defendant and co-defendant Rodriguez could be responsible for the allegedly slanderous and libelous statements. If there is slander and/or libel, it is to be determined under the laws of the Commonwealth of Puerto Rico, which we assume as neither of the parties has elected to suggest any source, would have to be found in #1802 of the Civil Code, 31 LPRA 5141, or, more likely, the special action of the Code of Civil Procedure, 32 LPRA 3141-3149. This, however, begs the issue, which is whether co-defendant Rodriguez was personally sued under such a cause of action.

The complaint on a motion to dismiss must be liberally interpreted. While a liberal interpretation perhaps could support plaintiff's position, in view of the changed circumstances arising from the substitution of the new trustee, an amendment of the pleadings would assist the trial of this case greatly.

The plaintiff is granted 10 days to amend its complaint; absent such an amendment within the 10 days, the motion to dismiss will be granted.

San Juan, Puerto Rico, this 14th day of December, 1983.

s/ W. H. BECKERLEG

W. H. BECKERLEG

cc/ JOHN M. GARCIA
CHARLES CUPRILL HERNANDEZ
R. OTERO BIGLES
12-15-83
P.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Misc. No. 84-0035 (JAF)

MARSHALL J. KAGAN,
PLAINTIFF,

v.

SAN JUAN HOTEL CORPORATION, HECTOR M. RODRIGUEZ-ESTRADA, AND HANS LOPEZ STUBBE, AS TRUSTEE OF SAN JUAN HOTEL CORPORATION,
DEFENDANTS.

MEMORANDUM OPINION AND JUDGMENT

After a thorough examination of the pleadings and documents on file, we conclude that this court lacks jurisdiction to entertain a suit by a private citizen against an ex-trustee of a bankruptcy estate where diversity-of-citizenship jurisdiction, 28 U.S.C. Sec. 1332, is absent and the parties are not subject to a bankruptcy proceeding. We further find that the suit initiated by plaintiff Marshall J. Kagan as an adversary proceeding against the bankrupt, San Juan Hotel Corporation, should be remanded to the bankruptcy court, since withdrawal of reference as mandated by 28 U.S.C. Sec. 157(d) is not warranted here.

On March 10, 1983, Marshall J. Kagan filed an adversary proceeding before the bankruptcy court against the estate of debtor San Juan Hotel Corporation and trustee Hector M. Rodriguez-Estrada, for wrongful dismissal from employment. Plaintiff also made allegations of slander against the trustee. The complaint was subsequently amended to include Hans

Lopez-Stubbe, who succeeded Mr. Rodriguez-Estrada as trustee upon the latter's removal from his position. Defendant Rodriguez-Estrada moved for dismissal. The bankruptcy court elevated defendant's motion to dismiss to the district court.

On July 16, 1984, Rodriguez-Estrada filed a second motion to dismiss, alleging that the action is a claim for damages against him in his personal capacity and that the bankruptcy court lacked jurisdiction to entertain such suit. 28 U.S.C. Sec. 157(b)(5). This motion was also referred by the bankruptcy court to this court. The Hon. Raymond L. Acosta, U.S. District Judge, held that the bankruptcy court could entertain personal injury claims with the consent of all the parties.[1] Judge Acosta retained the case. His order was entered on April 3, 1985.

Codefendant Hector M. Rodriguez-Estrada moved for reconsideration alleging that the pleaded cause of action was not one "arising under or related to title 11." Plaintiff Kagan opposed stating that the allegation of actions and/or omissions pertaining to Rodriguez-Estrada occurred during his tenure as trustee. Rodriguez-Estrada's motion for reconsideration and/or dismissal was denied by Judge Acosta on December 6, 1985.

Subsequently, defendant Rodriguez-Estrada filed a motion to strike and for sanctions. The same was received by the Clerk as tendered for filing. This matter remained undecided when Judge Acosta transferred this case to our docket. The tendered motion is dated October 18, 1985. The motion to strike requests that we sanction Mr. Kagan for signing motions *pro se*. Codefendant Rodriguez-Estrada understood that all pleadings were to be signed by counsel. Counsel for plaintiff,

[1] The bankruptcy judge had stated as to this matter that "a proceeding based on improper acts of a Trustee while engaged in the administration of an estate under this court's jurisdiction would seem to be a matter exclusively for our consideration. . . . While the personal properties and assets of an ex-Trustee are also at risk in this case, they were placed at risk by him when he accepted the appointment."

John M. Garcia, had filed a motion withdrawing legal representation as of January 19, 1985.

Rodriguez-Estrada's motion to strike and for sanctions requests that we "eliminate" the Kagan motions. In so doing, he cited Local Rule 204.3, requiring that pleadings and motions be signed by the attorney of record. We do not pass upon the mentioned motion exchange. Mr. Kagan *now* has retained counsel. We do reexamine the jurisdictional allegation in the case against ex-Trustee Rōdriguez-Estrada.

Even though this Court had found jurisdiction on the slander cause of action against the ex-Trustee, we now VACATE said order. Jurisdiction is not present. Federal bankruptcy jurisdiction does not extend to cover actions that have no effect on the estate of the debtor. *See In re Turner*, 724 F.2d 338 (____ Cir. ____); *First State Bank* v. *Sand Spring State Bank*, 528 F.2d 350 (10th Cir. 1976) (court in bankruptcy cannot entertain jurisdiction of private matters which do not relate to matters pertaining to the estate).

JUDGMENT

The slander cause of action is DISMISSED WITHOUT PREJUDICE. The adversary proceeding against debtor Hotel San Juan Corporation, ex-trustee Hector M. Rodriguez-Estrada, and Mr. Lopez-Stubbe as succeeding trustee, brought against him in his official capacity, is REMANDED to the bankruptcy court for further proceedings. The bankruptcy court will pass upon the allegation of wrongful dismissal from employment.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 27th day of August, 1986.

s/ JOSE ANTONIO FUSTE

JOSE ANTONIO FUSTE
U.S. District Court

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

Chapter # 7B-8000259(SEK)
ADV. # 8301A3

MARSHAL J. KAGAN,
PLAINTIFF,

v.

THE SAN JUAN HOTEL CORPORATION,
DEFENDANT.

DEPOSITION OF

MARSHAL J. KAGAN

Taken at the offices of LLOVERAS & QUILLICHINI, Recinto Sur Street, Old San Juan, Puerto Rico. On October 26th, 1989, at 10:00 o'clock in the morning.

were held before the Citizens Committee of the house of Representatives, do you recall that?

A. Yes.

Q. When were they held?

A. I think February of nineteen-eighty-three (1983).

Q. So, that would have been still when Mr. Rodriguez Estrada was a trustee?

A. Yes, he was trying in the last ditch attempt to keep himself in the El San Juan. He was trying to get the government to provide additional financing.

Q. Did you appear before that committee.

A. Yes.

Q. When did you appear before the committee?

A. Well, in February nineteen-eighty-one (1981).

Q. Nineteen-eighty-three you mean (1983)?

A. Eight-three (83), sorry.

Q. Do you claim, from what I read, I gather that basically what you're saying is that, you were defamed or slandered or libeled in those hearings. Is that right?

A. Yes, that's correct. Since there has been a ruling in the District Court that the slander claim can't be heard. The reason for including it here is the fact that Rodriguez finally gave the reason for dismissing me. He had never given me a reason, and he claimed that he was

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IN THE UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF PUERTO RICO

Case No. 80-00259 SEK
Chapter 7
ADVERSARY No. 83-0183

IN THE MATTER OF:
EL SAN JUAN HOTEL CORPORATION,
DEBTOR,
MARSHALL J. KAGAN,
PLAINTIFF,

v.

EL SAN JUAN HOTEL CORP., HECTOR RODRIGUEZ ESTRADA, HIS WIFE JANE DOE AND THE LEGAL SOCIETY CONSTITUTED BY BOTH OF THEM; HANS LOPEZ STUBBE, AS TRUSTEE OF EL SAN JUAN HOTEL CORP., IN HIS PERSONAL CAPACITY, HIS WIFE JANE DOE AND THE LEGAL SOCIETY CONSTITUTED BY BOTH OF THEM; RODRIGO OTERO BIGLES, HIS WIFE JANE DOE AND THE LEGAL SOCIETY CONSTITUTED BY BOTH OF THEM,
DEFENDANTS.

PARTIAL FINAL JUDGMENT

Upon the Order entered by the Honorable Sara De Jesus in open Court at hearing held on September 11, 1990 and Order entered on September 17, 1990, it is now

ADJUDGED AND DECREED that judgment be and is hereby entered in favor of Plaintiff in the second claim for relief in the amended complaint filed on July 29, 1988 for the amount of $7,051.28. Decision of whether said payment will be considered as a Chapter 11 claim has been reserved. It is further

ADJUDGED AND DECREED that the third claim for relief as it pertains to claim for libel and slander be and is hereby dismissed for the reasons stated by the Hon. Jose Antonio Fuste in his Opinion and Order entered August 27, 1986 and Judgment entered August 28, 1986, and it is further

ADJUDGED AND DECREED that the request for punitive damages be and is hereby denied for the reasons stated by the Hon. William H. Beckerleg in Order entered November 8, 1984 and Partial Judgment entered November 16, 1984.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 17th day of September, 1990.

s/ FRANCES RIOS DE MORAN

FRANCES RIOS DE MORAN
Clerk of Court

cc: MARSHAL KAGAN
UST
PETER J. PORRATA
JOHN GARCIA
HANS LOPEZ
RODRIGO OTERO
C. CUPRILL
CABASSA
POREATA
DOMINGUEZ V. TOTTI
9/18/90
J.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

Case No. 80-00259 (SEK)
Chapter 7
ADV. No. 83-0183

IN THE MATTER OF:
EL SAN JUAN HOTEL CORP.,
DEBTOR,
MARSHAL J. KAGAN,
PLAINTIFF,

v.

EL SAN JUAN HOTEL CORP., ET AL.,
DEFENDANTS.

ORDER

The Order issued in open Court on September 11, 1990 is hereby amended *Nunc Pro Tunc* to provide that the Clerk will enter a Partial Final Judgment in accordance with the adjudications made in open Court, as there is no just reason for any delay in so doing. Bankruptcy Rule 7054(a) and F.R.C.P. 54(b).

Clerk will give notice of this Order.

GIVEN in San Juan, Puerto Rico, this 17th day of September, 1990.

s/ SARA DE JESUS

SARA DE JESUS
U.S. Bankruptcy Judge

cc: MARSHAL KAGAN
UST
PETER J. PORRATA
JOHN GARCIA
LEPOLDO CABASSA
C. CUPRILL
DOMINGUEZ V. TOTTI
HANS LOPEZ
9/18/90

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

Case No. 80-00259 (SEK)
Chapter 7
Adv. No. 83-0183

In the Matter of:
EL SAN JUAN HOTEL CORP.,
DEBTOR,
MARSHALL J. KAGAN,
PLAINTIFF,

v.

EL SAN JUAN HOTEL CORP., HANS LOPEZ STUBBE, AS TRUSTEE OF EL SAN JUAN HOTEL CORP., HIS WIFE JANE DOE AND THEIR CONJUGAL SOCIETY, RODRIGO OTERO BIGLES, HIS WIFE JANE DOE, AND THEIR CONJUGAL SOCIETY,
DEFENDANTS.

ORDER

Mr. Hector Rodriguez Estrada will show cause in writing, within 60 days, why a default judgment should not be entered against him in the causes of action yet to be adjudicated in this adversary proceeding, as per Amended Complaint filed on July 28, 1988 (docket entry 147) and Opinion and Order entered by the undersigned today.

Failure to comply with this Order may cause the Court to enter appropriate sanctions, including a judgment by default as stated above.

The Clerk will notify this Order and follow up on the matter.

GIVEN in San Juan, Puerto Rico, this 20th day of March, 1992.

s/ Sara de Jesus

Sara de Jesus
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

Case No. 80-00259(SEK)
Chapter 7
ADV. No. 83-0183

IN THE MATTER OF:
EL SAN JUAN HOTEL CORP.,
DEBTOR,
MARSHAL J. KAGAN,
PLAINTIFF,

v.

EL SAN JUAN HOTEL CORP., HANS LOPEZ STUBBE, AS TRUSTEE OF EL SAN JUAN HOTEL CORP., HIS WIFE JANE DOE, AND THEIR CONJUGAL SOCIETY, RODRIGO OTERO BIGLES, HIS WIFE JANE DOE, AND THEIR CONJUGAL SOCIETY,
DEFENDANTS.

OPINION AND ORDER

I. BACKGROUND

The Amended Complaint filed after this proceeding was remanded is predicated on the following factual allegations.[1]

Mr. Marshall Kagan is a certified public accountant. He was employed as comptroller by El San Juan Hotel Corporation (the Hotel). When the Corporation filed for the protection afforded by Chapter 11 of the U.S. Bankruptcy Code, Mr. Kagan was employed by both the Debtor in possession and the former trustee, Mr. Hector Rodriguez Estrada (the Trustee). All told, his employment as comptroller for the Hotel lasted from approximately September of 1979 until

[1] This is actually a third amended complaint. The Second Amended complaint was withdrawn by the Plaintiff on May 5, 1988, docket entry 135.

December 29, 1982, when he received a letter signed by the Trustee summarily dismissing him.

Following several phone calls, Mr. Rodriguez Estrada agreed to meet with Mr. Kagan. According to Mr. Kagan, the Trustee agreed to destroy the December 29th letter of dismissal, substituting it for one which stated Mr. Kagan's employment was terminated because the case was converted to Chapter 7 and the Hotel would be closed.[2] *The Trustee also agreed to pay the amount of severance requested by Mr. Kagan. The Trustee did not honor this agreement.*

Mr. Kagan testified at a public hearing before the P.R. House of Representatives' Committee on Tourism. He stated the Hotel El San Juan would be closed because of the Trustee's poor management and failure to follow the Bankruptcy Court's instructions to operate the Hotel as economically as possible. When the Trustee testified he did not deny Mr. Kagan's charges of his poor management. He accused Mr. Kagan of participating in a conspiracy with others to close the Hotel. These statements were televised and reported in the newspapers. Mr. Kagan claims he was dismissed because of this testimony.[3]

When Mr. Hans Lopez Stubbe (the Successor Trustee) was appointed to succeed Mr. Rodriguez Estrada as Trustee in the case, he hired Mr. Otero Bigles as his counsel. Mr. Kagan approached both of them to have them rectify the record of his dismissal. They failed to do this. This failure to rectify the reasons for Mr. Kagan's dismissal prevented Mr. Kagan from obtaining future employment.

Mr. Otero Bigles, as Attorney for the Successor Trustee, urged U.S. District Judge Jose A. Fuste not to permit an action against the former Trustee, while at the same time receiving

[2] The Second Order converting the case to Chapter 7 was entered on April 20, 1983.

[3] The parties refer to this alleged cause of dismissal as "whistle blowing".

fees from Mr. Rodriguez Estrada in the case of "Northeastern Promotions" (sic).[4] According to Mr. Kagan, this is a violation of rules of professional conduct. It was not until this conduct was disclosed to U.S. District Judge Fuste, did Mr. Lopez Stubbe "fire" Mr. Otero Bigles. Hence, they both participated in a "cover up" which harmed Mr. Kagan.

Pursuant to these alleged facts, Mr. Kagan claims remuneration based on the following causes of action:

1. the summary dismissal which violated his rights of due process, public policy and the U.S. Bankruptcy Code;

2. the summary dismissal which violated Law #80, 29 Laws of P.R. Ann. Sections 185 (a)-(i);

2. the summary dismissal which violated Law #80, 29 Laws of P.R. Ann. Sections 185 (a)-(i);

3. the statements made by Mr. Rodriguez Estrada, broadcasted on television and published in the newspapers which were slanderous and libelous;

4. the cover-up engineered by the Successor Trustee and his Counsel and their failure to rectify Mr. Kagan's retaliatory summary dismissal which were willful negligent acts;

5. Mr. Otero Bigles' conduct violated the attorneys' rules of professional conduct.

The specific remedies requested were:

1. reinstatement and back pay to be assessed as an administrative expense due as Comptroller for El San Juan Hotel;[5]

2. payment as an administrative expense of $7,051.28 of severance pay; of a $961.54 bonus; of $728.00 for expenses; of $3,000.00 relocation or moving expenses;

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[4] See *In Re San Juan Hotel*, 841 F.2d 6 (1st Cir. 1988); and, *In Re San Juan Hotel*, 847 F.2d 931 (1st Cir. 1988).

[5] Mr. Kagan claims he is owed these sums both as a Chapter 11 and Chapter 7 administrative expense because of the continuing nature of the tortious conduct.

3. award $500,000.00 and $1 million in punitive damages; $100,000.00 for pain and suffering; $100,000.00 for damages to his professional reputation; $500,000.00 for compensatory damages due to his retaliatory discharges.[6]

The following causes of action and requests for damages have been adjudicated:

1. Partial summary judgment was entered in open Court on September 12, 1990, granting the cause of action for wrongful dismissal based upon Law 80, 29 Laws of P.R. Ann. Section 185 (a)-(i). The award was limited to the severance pay requested in the amoung of $7,051.98.[7] Compensatory damages requested pursuant to Law #80 in the form of $728.000 of expenses incurred by Mr. Kagan during his employment as the Comptroller for El San Juan Hotel, a bonus of $961.54, and $3,000.00 for his moving or relocation expenses, were denied. A Partial Final Judgment was entered accordingly on September 18, 1990.

2. U.S. District Court Judge Jose A. Fuste entered a Memorandum Opinion and Order on August 28, 1986, dismissing without prejudice "the slander cause of action

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[5] Mr. Kagan claims he is owed these sums both as a Chapter 11 and Chapter 7 administrative expense because of the continuing nature of the tortious conduct.

[6] The Estate, Mr. Rodriguez Estrada, his wife and their conjugal partnership, Mr. Hans Lopez Stubbe, his wife and their conjugal partnership, and Mr. Otero Bigles, his wife, and their conjugal partnership should apparently all be jointly and severally liable for these damages.

[7] We cannot determine whether this severance payment for discharge awarded to Mr. Kagan on Sept. 12, 1990, for his dismissal without cause under 29 Laws of P.R. Ann. Section 185 (a), should be afforded the Code Section 503 (b)(1)(A) administrative priority, in view of *In Re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976) and 3 *Collier On Bankruptcy*, 503.04 (15th ed). 29 Laws of P.R. Ann., Sec. 185 (a) calls for an award of one month of salary, plus an additional progressive indemnity equivalent for one week for each year of service as defined by the law. We have no evidence of Mr. Kagan's salary during the periods in question, nor can we determine whether he was employed while the Debtor was under Chapter 11 or 7 of the Code. This information is available to the Successor Trustee and we will enter a separate Order accordingly.

. . . [because] federal jurisdiction was not present."[8] The Clerk of the U.S. District Court entered a partial judgment accordingly. As per our Order, the Clerk of the Bankruptcy Court entered a partial final judgment on September 18, 1990, dismissing this cause of action.[9]

3. Judge Fuste's August 28th Memorandum Opinion and Order also dismissed the cause of action against the "ex-trustee of a bankruptcy estate [in his personal capacity] where diversity of citizenship jurisdiction, 28 U.S.C. Section 1332, is absent and the parties are not subject to a bankruptcy proceeding".

4. The requests for $1 million and $500,000.000 in punitive damages were denied as per opinion entered by Judge Beckerleg in open Court on August 10, 1984, his Order Dismissing the 35th Allegation entered on November 8, 1984, the Partial Judgment entered on November 16, 1984, and the Partial Final Judgment entered on September 18, 1990.

Judge Fuste remanded ". . . the adversary proceeding against debtor Hotel San Juan Corporation, ex-trustee Hector M. Rodriguez-Estrada, and Mr. Hans Lopez Stubbe as succeeding trustee, brought against him in his official capacity, to the bankruptcy court for further proceedings."

Trial before the undersigned on the remanded causes of action began on May 24, 1988. For reasons stated in open court, the trial was stopped. Mr. Kagan was given ample opportunity to obtain counsel. He chose to appear pro se at new trial which began on September 11, 1990.

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[8] This adversary proceeding was originally assigned to Bankruptcy Judge Antonio I. Hernandez. By Order entered on November 17, 1983, he reassigned the proceeding to Bankruptcy Judge William H. Beckerleg. Judge Beckerleg entered a Transmittal of Motion to Dismiss to the U.S. District Court on August 29, 1984. It was apparently assigned to U.S. District Court Judge Raymond Acosta Judge Acosta transferred the case to the docket of Judge Fuste. Judge Fuste vacated Judge Acosta's Order of December 5, 1985, dismissed the slander cause of action and remanded the case to the Bankruptcy Court on August 28, 1986.

[9] See transcript of the September 11, 1990 hearing entered on September 19, 1990, and order entered on September 17, 1990.

On that date the Court ordered the severance of the trial against former Trustee, Mr. Hector M. Rodriguez Estrada.

II. ORDER REMANDING THE CASE

Before the second trial began, Defendants requested a ruling on whether the Memorandum Opinion and Order entered by Judge Fuste of August 26, 1986, excludes litigation against Messrs. Hans Lopez Stubbe and Otero Bigles, their wives and their conjugal societies for any personal liability on account of the allegations of cover up contained in the amended complaint. Defendants claim the transmittal from the Bankruptcy Court to the U.S. District Court with reference to the former trustee, Mr. Rodriguez Estrada and the adjudication thereof disposed of this question when Judge Fuste stated:

> "After a thorough examination of the pleadings and documents on file, we conclude that this court lacks jurisdiction to entertain a suit by a private citizen against and ex-trustee of a bankruptcy estate where diversity-of-citizenship jurisdiction, 28 U.S.C Sec. 28 U.S.C. Sec. 1332, is absent and the parties are not subject to a bankruptcy proceeding."

The Judge ordered the bankruptcy court to adjudicate, "The adversary proceeding against the debtor Hotel San Juan Corporation, the ex-trustee Hector M. Rodriguez-Estrada, and Mr. Hans Lopez-Stubbe as succeeding trustee, brought against him in his official capacity . . .". The Opinion also vacated an April 3, 1985 order entered by a colleague which had provided ". . . the banktuptcy court could entertain personal injury claims with the consent of all the parties." Lastly, Judge Fuste's Order stated, "federal bankruptcy jurisdiction does not extend to cover actions that have no effect of the estate of the debtor. See *In re Turner*, 724 F.2d 338 (____ Cir. ____); *First State Bank* v. *Sand Spring State Bank*,

528 F.2d 350 (10th Cir. 1976) (court in bankruptcy cannot entertain jurisdiction of private matters which do not relate to matters pertaining to the estate)."

We believe Judge Fuste meant for the bankruptcy court to limit its inquiry on remand to considering whether the former and successor Trustees are liable for actions or omission while acting in their official capacities even though their personal properties and assets may be at risk. This means the issues tried were narrowed down to:

1. Whether the Successor Trustee or his former Counsel may be liable for the alleged cover-up and failure to rectify the former Trustee's summary dismissal of Mr. Kagan?

2. Whether Mr. Rodrigo Otero Bigles has violated the rules of professional conduct by acting as counsel for the Successor Trustee, while at the same time receiving remuneration from the Former Trustee in the case of Northwestern Promotions, Inc., and by advising the Successor Trustee to settle adversary proceeding no. 84-0359 filed in this case?

III. FINDINGS OF FACT

1. Mr. Hector Rodriguez Estrada was appointed a Chapter 11 operating trustee in this case.

2. He hired or assumed Mr. Kagan's employment as comptroller for the El San Juan Hotel around August 27, 1979.

3. On December 29, 1982, Mr. Rodriguez Estrada as Trustee, executed and delivered a letter terminating Mr. Kagan's employment. This letter stated:

> "We deeply regret that after making extensive evaluations of your performance as Comptroller of El San Juan Hotel, you are hereby dismissed from your position and

work at El San Juan Hotel, effective tomorrow Thursday, December 30, 1982."

4. Both Messrs. Kagan and Rodriguez Estrada testified before the Puerto Rico House of Representative's Committee on Tourism as per Joint Exhibits 6 & 7.

5. As per newspaper reports, Mr. Kagan accused the Trustee of mismanagement at the El San Juan Hotel thereby causing the Debtor to incur in substantial losses, and of personally benefitting from his position as operating trustee in bankruptcy.

6. As per letter dated December 29, 1983, Mr. Kagan urges the Successor Trustee to take action in accordance with wishes of several creditors and the information he provided to recuperate some of the losses caused by the former trustee's mismanagement of the Hotel.

7. Mr. Otero Bigles responded on January 3, 1984, that as attorney for the Successor Trustee and after reviewing the available evidence, Mr. Hans Lopez Stubbe had no evidence available on which he could rely to pursue the cause of action suggested.

8. The exchange between Messrs. Kagan, Lopez Stubbe and Otero Bigles continued along above mentioned course becoming increasingly strident as per Joint Exhibits 12-17.

9. As per Exhibit 19, Mr. Otero Bigles represented Mr. Hector Rodriguez Estrada, in a reply to a motion filed by the Internal Revenue Service on August 11, 1985, filed in the Bankruptcy case of Northwestern Promotions, Inc.

10. The Successor "Trustee's Report to the Court" filed on May 16, 1985 (apparently in response to previous report filed by Mr. Kagan), brought to the attention of the Court the different positions assumed by Mr. Kagan and the Successor Trustee concerning ability to recuperate mismanaged funds for the estate and alleged problems with conflict of interest of Mr. Otero Bigles.

11. Judge Fuste's Findings of Fact as per pp. 7-9, 12-13, and 26 of Joint Exhibit 21, speaks to the role of Mr. Kagan in establishing the evidence used to find the Former Trustee, Mr. Hector M. Rodriguez Estrada, liable to this Estate in the civil suit instituted on behalf of the Estate. Judge Fuste entered a judgment finding Mr. Rodriguez liable to the Estate and ordered him to pay $3,434,081.82.[10]

12. On February 6, 1987, as per Joint Exhibit 23, Mr. Hans Lopez Stubbe asked Mr. Otero Bigles to withdraw as his counsel in this case.

13. Mr. Kagan testified Mr. Lopez Stubbe refused to honor the agreement he had with Mr. Rodriguez Estrada to remove the December 29th letter dismissing him from his position as Comptroller and substituting it with a new letter of termination of employment on account of the conversion to Chapter 7 and closing of the Hotel. He also testified Mr. Lopez Stubbe refused to give him letters of recommendation which he might use to secure future employment and refused to settle the severance pay and other charges he claimed under Law #80.

14. Mr. Lopez Stubbe testified he was not privy to the purported agreement between Mr. Kagan and the former Trustee and could not find any evidence of such an agreement on record. He also testified he could not give Mr. Kagan letter of recommendation for future employment, as he had never employed Mr. Kagan. The Trustee stated he had agreed to the severance pay, but not to the other charges claimed by the Trustee under Law #80.

CONCLUSIONS OF LAW

1. Whether the Successor Trustee or his former Counsel may be liable for the alleged cover up and failure to rectify

[10] This was later reduced on appeal to $2,137,639.60, along with an additional potential liability up to $1,000,000.00 for the casino's worker's back pay award, as per holding in the case of In Re San Juan Hotel Corp., 847 F.2d 931 (1st Cir. 1988).

the former Trustee's summary dismissal of Mr. Kagan?[11]

The Memorandum Opinion and Order entered by Judge Fuste on August 26, 1986, precludes our considering whether Mr. Otero Bigles, his wife and their conjugal partnership may be liable to Mr. Kagan for these causes of action.

The record shows Mr. Lopez Stubbe's testimony as to the purported agreement with Mr. Rodriguez Estrada to expunge the letter of Mr. Kagan's summary dismissal is correct. There is no evidence of such an agreement, other than Mr. Kagan's testimony. We do not believe the Successor Trustee was obliged to remove the letter of dismissal from Mr. Kagan's personnel file under these circumstances.

We do not find the Successor Trustee liable for his failure to provide Mr. Kagan with references which he could present when applying for jobs. The Successor Trustee never employed Mr. Kagan. It is reasonable to assume he could not attest to Mr. Kagan's capabilities as an employee nor evaluate his professional services.[12]

We have been provided no evidence which shows the Successor Trustee participated in a "cover up" designed to harm Mr. Kagan. Mr. Kagan seeks to substantiate this charge by producing a legal opinion rendered by Counsel to the Successor Trustee as to the probability of prevailing in an action

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[11] The Defendants have argued this cause of action is foreclosed by Law #80. According to their theory, Law #80 is the exclusive remedy available to an employee who has been wrongfully dismissed. Hence, the Mr. Kagan's only and exclusive cause action against these Defendants is Law #80. In our view, Mr. Kagan is not claiming redress for his wrongful dismissal against these Defendants. He asks for redress of harm caused by these Defendants cover-up of the wrongful dismissal and their failure to provide references which prevented him from obtaining employment following the summary dismissal.

[12] 11 U.S.C. Section 704 enumerates the duties of a Chapter 7 Trustee. These do not include providing references to former employees of a debtor.

against the former Trustee given the information available at that point in time. Mr. Kagan has also produced documents showing this legal opinion was reiterated in Motions and Reports submitted to the Bankruptcy Court. While Counsel's position adopted by the Successor Trustee may have been incorrect, it certainly was not in the nature of a "cover-up".[13]

2. Whether Mr. Rodrigo Otero Bigles has violated the rules of professional conduct by acting as Counsel for the Successor Trustee while at the same time receiving remuneration from the former Trustee in the case of Northwestern Promotions, Inc., and by advising the Successor Trustee to settle adversary proceeding no. 84-0359 filed in this case?

11 U.S.C. Section 327 provides the Trustee, with the Court's approval, may employ an attorney provided this attorney is a disinterested person and does not hold an interest adverse to the estate. The Code does not grant the Bankruptcy Court jurisdiction to entertain questions concerning an attorney's violation of the rules of professional conduct.

We realize we have a pro se Litigant and should therefore afford him certain leeway in the prosecution of his case. However, even if we were to consider Mr. Kagan's claim as a violation of the mentioned section of the Bankruptcy Code, the remedy is disgorgement of fees for the benefit of the Estate.[14] Mr. Kagan would therefore, have no remedy under this Section of the Code. We therefore, decline to enter an opinion as to this issue.

WHEREFORE, for the reasons stated above we dismiss the remaining causes of action in this adversary complaint

[13] See Opinion and Order entered in the case of San Juan Hotel Corp., Bankruptcy number 80-00259-A, on April 18, 1985, by Bankruptcy Judge Antonio I. Hernandez Rodriguez.

[14] Am. Bankr. Inst., *American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases* 153-154 (G.R. Warner rep. 1991).

filed against all Co-Defendants, except Mr. Hector Rodriguez Estrada in his capacity as a former Trustee in the captioned case.

The Clerk will enter a partial final judgment accordingly as there is no just reason for any delay in so doing as per Bankruptcy Rule 7054 (a) and Federal Rule of Civil Procedure 54 (b).

GIVEN in San Juan, Puerto Rico, this 20th day of March, 1992.

s/ SARA DE JESUS

SARA DE JESUS
U.S. Bankruptcy Judge

Certified Translation by
THOMAS H. KAVELIN, USDCC

[page 9159:]

92 JTS 11
LILLIAN SANTIAGO
PLAINTIFF-APPELLANT

v.

KODAK CARIBBEAN, LTD.
DEFENDANT-APPELLEE.

Nos. RE-89-319/RE-89-278

JUDGMENT OF THE SUPERIOR COURT, CAROLINA PART
HON. ANGEL GONZALEZ ROMAN, J.

REVIEW

San Juan, Puerto Rico, on 30 January 1992

CITE 92 JTS 11

OPINION OF THE COURT ISSUED BY
ASSOCIATE JUSTICE NAVEIRA DE RODON

Counsel for appellant: Jose Luis Verdiales Morales & Jose J. Santiago (Fiddler, Gonzalez & Rodriguez). Counsel for appellee: Reinaldo Ramos Collazo.

Work-related Accidents: Retention of Employment Following Work-Related Accident
Labor Law: Unjustified Dismissal.

Plaintiff-appellant, an employee of Kodak, brought an action against the latter, alleging dismissal without just cause — claiming the benefits under Act 80 of May 30, 1976 — and violation of Article 5a of the Workmen's Accident Compensation Act, demanding reinstatement on the job. The Superior Court entered partial summary judgment dismissing the action under

[page 9160:]

Article 5a of the Workmen's Accident Compensation Act and, following the appropriate hearing, granted the complaint under Act 80 by finding that there was an unjustified dismissal. Both parties appealed to the Supreme Court. The Supreme Court, in an Opinion issued by Associate Justice Naveira de Rodon, confirmed the appealed judgments by ruling that: (i) Article 5a of the Workmen's Accident Compensation Act does not benefit the employee who has been dismissed and later reports an accident to the State Insurance Fund which had occurred prior to the dismissal, and (ii) the dismissal of plaintiff was without just cause. Associate Justice Negron Garcia disqualified himself. Associate Justice Negron Garcia issued a Dissident Opinion.

NORMATIVE SUMMARY*

1. *Work-Related Accidents, Interpretation of Statutes, Liberal Construction of the Workmen's Accident Compensation Act, Spirit and Letter of the Law.*
Although the Workmen's Accident Compensation Act, being a remedial statute, should be interpreted in favor of the laborer, if the law is clear and free of ambiguity, its letter should not be undervalued under the pretext of complying with its spirit.

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2. *Work-Related Accidents, Employment Reserve for Employee Who Suffers a Work-Related Accident (Article 5a of the Workmen's Accident Compensation Act).*

Article 5a of the Workmen's Accident Compensation Act establishes two types of protection for the laborer who suffers a work-related accident and reports [to the State Insurance Fund] and avails himself of the benefits offered by the Workmen's Accident Compensation Act. First, it imposes on the employer the duty to reserve for the laborer for twelve (12) months, the job he was performing at the time the accident occurred. In the second place, the laborer is entitled to be reinstated in that same job once he is discharged from treatment by the Fund, applies to the employer to reinstate him, subject to the three (3) conditions established in said Article: (1) that the laborer or employee demand reinstatement from the employer in his job within the period of fifteen days from the date the laborer or employee was discharged from treatment, and as long as said demand is not made after the lapse of twelve months from the date of the accident; (2) that the laborer or employee is mentally and physically fit to fill said job at the time he demands reinstatement from the employer; and (3) that said job still exists at the time the laborer or employee demands reinstatement. (The job shall be understood to exist when the same is vacant or is being filled by another laborer or employee).

3. *Id.*

The protection offered to the laborer by Article 5a of the Workmen's Accident Compensation Act is absolute: if the laborer engages in conduct which constitutes just cause for dismissal before the work-related accident, the employer is not under obligation to reinstate him in his job, but rather may dismiss him. What the employer may not do is dismiss the laborer after he has suffered the work-related accident, or refuse to reinstate him, without just cause therefor.

4. *Id.*
Article 5a of the Workmen's Accident Compensation Act does not apply (does not benefit) an employee who has been dismissed and then reports an accident to the State Insurance Fund which occurred prior to said dismissal.

5. *Labor Law, Dismissal of Employees, Just Cause for Dismissal.*
Under the laws of Puerto Rico, there is no absolute prohibition against the dismissal of an employee; if there is just cause, the employee may be dismissed without any remedies.

6. *Id., Unjustified Dismissal (Act 80).*
Act 80 of May 30, 1976, provides a financial remedy — indemnity — for the employee dismissed without just cause (29 LPRA sec. 185a). The law establishes a series of circumstances or actions which can give rise to justified dismissal, some imputable to the employee, others to the employer or the financial state of the company (29 LPRA sec. 185b).

7. *Labor Law, Dismissal of Employees, Manner of the Dismissal.*
There is no law which obliges the employer to dismiss an employee or to do so in a set fashion, either in writing or with prior notice. Nor does the law place the employer under obligation to inform the laborer, at the time of the dismissal, or thereafter, of the reasons it had for dismissing him, except in order to defend itself in a court action.

8. *Labor Law, Dismissal of Employees, Unjustified Dismissal (Act 80).*
An employer who dismisses an employee because the latter has availed himself of a plan of benefits which are provided by the company's Employee Manual — which forms a part of

the job contract — has no just cause for the dismissal, for purposes of Act 80 of June 30, 1976.

9. *Id., Job Contract, Employee Manual.*
A company's manual containing the rules and regulations of the job and establishes the standards, benefits and privileges which the employee shall enjoy, forms a part of the job contract. As a general rule, a pattern of non-compliance with these standards or rules could give rise to a justified dismissal.

[page 9161:]

Nevertheless, the absence of reasonableness of these standards could turn the dismissal into a capricious or arbitrary, and therefore, unjustified, dismissal. On the other hand, the benefits and privileges established therein constitute rights of employment, and a dismissal in violation thereof would also result in an unjustified dismissal.

10. *Contracts, Interpretation of Contracts.*
The clauses of a contract should be interpreted in relation to one another, giving to those that are doubtful the meaning which may appear from the consideration of all of them together.

COMPLETE TEXT OF THE OPINION

Mr. Lillian Santiago filed a complaint against Kodak Caribbean, Ltd. (hereinafter Kodak), alleging that she was dismissed without just cause and in violation of Article 5a of the Workmen's Accident Compensation Act, Act No. 45 of April 18, 1935, as amended, 11 L.P.R.A. sec. 7. She demanded the compensation provided by Act No. 80 of May 30, 1976, as amended, 29 L.P.R.A. sec. 186, "reemployment to her prior position, back pay and emotional and mental damages ... for being unlawfully dismissed and for defendant's refusal to rehire plaintiff".[1]

Kodak answered by asserting as affirmative defenses, among others, that the dismissal was justified given the *"plaintiff's chronic absenteeism and her poor attitude toward her responsibilities on the job"*; that plaintiff did not suffer any job-related accident; and that she did not fulfill the requirements of Article 5a of the Workmen's Accident Compensation Act.

Hence, Kodak filed a motion for entry of summary judgment, which plaintiff opposed. On March 27, 1989, the trial court entered partial summary judgment dismissing the action filed on the basis of Article 5a of the Workmen's Accident Compensation Act. With regard to the claim under Act No. 80, *supra*, it ruled that there was a controversy of fact and therefore entry of summary judgment was not in order.

Following a full hearing, on April 24, 1989, the trial court entered judgment finding that the dismissal had been unjustified. It awarded plaintiff *"an amount equal to one month's salary ($1,780.00) plus one week for every year of employment (9 weeks) $4,005.00, altogether the sum of $5,785.00, plus the amount of $1,500.00 in attorneys' fees"*.

Plaintiff Santiago appealed the partial summary judgment of March 27, 1989, before us, alleging that the trial court erred in entering partial summary judgment when there were relevant and material facts to the controversy that were clearly in dispute. Defendant Kodak in turn petitioned for review of the judgment entered on April 24, 1989. It questioned the appreciation of the evidence and the trial court's conclusion *"that plaintiff's chronic absenteeism and/or disability to perform her job is not just cause for her dismissal"*.

We granted the petitions for review and consolidated the cases.

I
FACTS RELEVANT TO CASE RE-89-278 -

The trial court, in its partial summary judgment of March 27, 1989, made the following findings of fact:

"Plaintiff Lillian Santiago began working for defendant Kodak on an indeterminate time basis on October 27, 1975, as Secretary of Publicity. She subsequently assumed several positions within the company until she ultimately occupied the position of saleswoman, after receiving an eleven- (11-) week training in the city of Rochester, New York, during the months of June to September, 1984.

In April, plaintiff began absenting herself from work due to emotional problems. The case file contains a medical certificate from Dr. Juan R. Diaz Troche, of April 28, 1984, vouching for her condition.

Her emotional condition at that time did not affect her in the performance of her functions in said training and she was awarded the "Billy T. Files Award" for her performance and the skills she displayed.

On February 19, 1985, plaintiff was absent from work.

Plaintiff would call her work site periodically to indicate her state of health.

On May 30, 1985, she was dismissed from her job.

In the letter of dismissal, she was not told why she was being fired.

On June 4, 1985, after her dismissal, plaintiff reported to the facilities of the State Insurance Fund.[2] She was given a psychiatric evaluation by Dr. Sampayo, who, on October 2, referred her to the Vocational Rehabilitation Program. On November 12, 1986, plaintiff was discharged by the State Insurance Fund. On that same date she applied for reinstatement to her job at Kodak.

[page 9162:]

Before the letter of dismissal plaintiff was never told nor was she admonished for her absences."

II
THE RIGHT OF RESERVE AND REINSTATEMENT ON THE JOB OF ARTICLE 5a OF THE WORKMEN'S ACCIDENT COMPENSATION ACT

The instant case allows us to rule on whether Article 5a of the Workmen's Accident Compensation Act, Act No. 45 of April 18, 1935, as amended, 11 L.P.R.A. Sec. 7, applies to an employee who has been dismissed and then reports an accident which had occurred prior to said dismissal, to the State Insurance Fund (hereinafter Fund).

Article 5a of the Workmen's Accident Compendation Act provides the following:

*"In the cases of working disability according to the provision of this chapter, **the employer shall be under obligation to reserve the job filled by the laborer or employee at the time the accident occurred, and to reinstate him therein**, subject to the following conditions: (1) that the laborer or employee demand reinstatement from his employer in his job within the period of fifteen (15) days counted from the date the laborer or employee is discharged from treatment, provided such demand is not made after the lapse of twelve months from the date of the accident; (2) that the laborer or employee be mentally and physically fit to fill said job at the time he demands reinstatement from his employer; and (3) that said job still exists at the time the laborer or employee demands reinstatement. (The job shall be understood to exist when the same is vacant or is being filled by another laborer or employee. The job shall be presumed to be vacant when the same was filled by another laborer or employee within thirty (30) days following the date on which the demand for reinstatement was made.)*

If the employer does not comply with the provisions of this section, he shall be under obligation to pay the laborer or employee or his beneficiaries the wages said laborer or employee would have received if reinstated, also the employer shall be responsible for all damage he has caused him. The laborer or employee or his beneficiaries may prosecute and file the corresponding claim for reinstatement and/or damages in court through ordinary proceedings or through the procedure for claiming wages set up by sections 3118-3132 of Title 32." Emphasis supplied.

We have repeatedly ruled that since the Workmen's Accident Compensation Act is a remedial statute, it must be interpreted liberally in favor of the laborer. *Bruno Colon* v. *Comision Industrial*, 109 D.P.R. 785 (1980); *Alonso Garcia* v. *Comision Industrial*, 84 D.P.R. 196 (1974); *Gallart, Admor* v. *Comision Industrial*, 87 D.P.R. 17 (1961). Now then, this does not mean that if *"the law is clear[ly] free of ambiguity, the letter thereof [must] be undervalued on the pretext of fulfilling its spirit"*. Article 14 of the Civil Code, 31 L.P.R.A. sec. 201; *Rojas* v. *Mendez & Co.*, 115 D.P.R. 50, 53 (1984); *Caban Mendez* v. *F.S.E.*, 115 D.P.R. 1, 3 (1983).

Article 5a establishes two types of protection for the laborer who suffers a work-related accident and reports [to the Fund] and avails himself of the benefits offered by the Workmen's Accident Compensation Act. First, it imposes upon the employer the duty to reserve for the laborer for twelve (12) months, the job in which he was engaged at the time the accident occurred. In the second place, the laborer is entitled to be reinstated at that same job once he is discharged from treatment by the Fund and applies to the employer to be reinstated, subject to the three conditions established in said Article.[3]

Now then, the protection offered by this Article to the laborer is not absolute. *"The case may arise wherein an employer discovers that a laborer who has suffered a work-*

related accident engaged in behavior prior to suffering said accident which is a justified cause for dismissal and in this case the employer obviously would not be under obligation to reinstate said laborer to his post, and could dismiss him for those prior acts without being prohibited therefrom by the prohibition of law. What may not be done is to dismiss him after he suffers an accident or to refuse to reinstate him at his job without the existence of just cause to dismiss him." Delgado Zayas, Ruy, *Apuntes para el Estudio de la Legislacion Protectora del Trabajo en el Derecho Laboral Puertorriqueno*, San Juan, Ramallo Bros. Printing, Inc., (1989), Chap. XI, p. 189.

A conscientious reading of Article 5a and case law which interprets the Workmen's Accident Compensation Act, convinces us that the purpose of said provision is to protect the injured laborer so that he "does not, in addition, have to be faced with the undesirable uncertainty of his employer dismissing him from his job without just cause because of his having suffered said accident, or being without a job when he returns after being discharged from treatment". Delgado Zayas, *supra*, p. 189. By imposing on the employer the duty of reserving for a period of twelve (12) months from the date of the accident, *"the job which he was performing at the time the accident occurred"*, the legislature established a balance between the interests of the laborer, that is, the economic security that returning to work at his old job represents, and those of the employer, by avoiding the onerousness of having to reserve the job indefinitely.

In an opinion issued on September 22, the Labor Solicitor correctly pointed out that *"the protection foreseen in Article*

[page 9163:]

5a of the Workmen's Accident Compensation Act supposes, in our judgement, that the employee avails himself of the

benefits of the Act while the labor-management tie is in effect. It implicitly involves the duty to report the accident prior to the rupture or termination of said tie. It should be noted that the duty to reserve the job supposes the continuity and existence of the labor-management relationship, for at least twelve (12) consecutive months (360 days) from the date of the accident". Legal Opinion No. 13310.

Wherefore, we rule that Article 5a of the Workmen's Accident Compensation Act does not apply to an employee who has been dismissed and then reports a work-related accident to the Fund which occurred before said dismissal.

The trial court acted correctly in dismissing the action brought under Article 5a of the Workmen's Accident Compensation Act.

III
FACTS RELEVANT TO CASE RE-89-319

The documents in the case file show the facts which we set forth below.

Plaintiff Santiago began working on an indeterminate time basis with defendant Kodak, on October 13, 1975. In a deposition taken on October 11, 1985, she stated that while working for Kodak, she became ill with an emotional problem of *"stress"*, depression, anxiety and insomnia and that on February 19, 1984 said *"illness reached the point where I simply couldn't function."* On May 30, 1984 she was dismissed.

The attendance reports submitted with the motion for summary judgment of February 17, 1989, by defendant Kodak, show that from January 1 to May 30, 1985, the date on which plaintiff was dismissed, she had been absent from her job for fifty-two and a half (52½) days; of these, forty-seven and a half (47½) were consecutively. The reports also reflect that in the last thirteen (13) months that plaintiff worked for Kodak, she was absent for a total of eighty-three (83) days.

In the Employee Manual of Kodak Caribbean, Ltd., submitted in evidence by plaintiff, concerning employee attendance, it states the following:

"ATTENDANCE

His primary and basic responsibility toward the Company is to be in attendance for his job regularly and punctually. A satisfactory attendance record is one of the requirements for employment with KCL.

When an employee is not punctual and is not in regular attendance on his job, this interrupts the flow of work in his department and creates an additional burden which falls on his co-workers. Therefore, his annual merit-based raise in wages may be affected by a poor attendance record.

The Company has provided protection to assure your income in cases of necessary absences. Nevertheless, the Company expects that you will make use of these allowed absences only when they are necessary and justified.

Once in a while all of us need time off to attend to matters which cannot be handled during non-working hours. Moreover, emergencies sometimes arise which require that we be absent from work for short periods of time. Your supervisor must be advised when these cases occur and the lost time shall be considered approved time off without pay.

Nevertheless, if you wish to be compensated, the Company will permit you to make up the lost time by working overtime.

This arrangement must be discussed with your supervisor. Those individuals who abuse this privilege shall not be allowed to make up the lost time and they will also be damaging their annual evaluation.

When an employee is absent he must notify his supervisor of this before 10:00 A.M. If your illness, etc., does not allow

you to return to work for several days, you must keep your supervisor informed at least once a week.

You will be given an attendance card at the start of each month. Your supervisor will mark your arrival and departure times on this card, as well as periods of absence. At the close of every two weeks, your attendance record must be signed by you and approved by your supervisor before being sent to the Personnel Department." (Emphasis supplied) pp. 8-9.

On the other hand, as for the benefits which Kodak grants the employee if he is absent for illness, said Manual provides:

"SICK LEAVE

The Company developed sick leave to protect you from loss of income owing to absences resulting from an illness or accident. The benefits of this plan are available only when you are ill. *You are not eligible for benefits under this plan when you miss work due to illness of other members of your family.*

If an employee misses work for a medical or dental appointment, the time lost from his job shall be considered as sick leave. You must advise your supervisor immediate[ly] before leaving for such appointments.

If an employee is absent for more than three days due to a medical reason, he or she must obtain a medical certificate before returning to work.

If you suffer an accident or illness which results in a short-term disability (fewer than 130 consecutive working days), you may be eligible to receive compensation for "lost pay" from a government plan (State Insurance Fund, Non-Occupational Disability, etc.). Nevertheless, the Company understands that this compensation is only a minimal help which will not permit you to cover all your financial obligations during your disability. Therefore, the Company will pay the difference between your basic wages and the disability benefits received. The maximum benefits

under this program are based on accrued sick leave on the basis of the employee's years of service at the Company. See the Sick Leave Table provided below.[5]

After 100% of your sick leave is exhausted, the Company will continue paying the difference between 50% of your basic pay and the disability benefits received up to a date equivalent to 130 working days from the date on which your disability commenced. An individual qualifies for the benefits under the program of continuing to receive 50% of wages, if he has been employed for one year before the occurrence of the illness or disability. Therefore, employees with less than one year of service qualify only for the benefits under the plan of 100% compensation for sick leave.

As a new employee of Kodak Caribbean, Ltd., you will accrue 1.25 days per month for every month in which you work 120 hours up to a maximum of 15 working days. After a full year of service, you will be entitled to compensation for absences due to illness for the time indicated below. When 130 working days of continuous absence expire, you will be eligible for the benefits under the 'Long-Term Disability Plan.'" (Emphasis supplied), pp. 13-14.

The trial court, in turn, made the following findings of fact:

"*1. Plaintiff's dismissal was due to her absences over the years during which she worked for defendant, particularly during 1984 and 1985.*

2. That before 1984, 1985, plaintiff was never told that her absenteeism could affect her in her job.

3. Plaintiff complied with company rules concerning absences; they were justified by illness.

4. Plaintiff was a highly competent employee; she had received recognition for her work several times during 1984 and 1985, and had even obtained the 'Billy T. Files Award'.

5. The smooth running and normal functioning of defendant was not altered by plaintiff's absences.

IV
DISMISSAL AND JUST CAUSE

In Puerto Rico there is no absolute prohibition against the dismissal of an employee. If there is just cause, he may be dismissed. Article 1 of Act No. 80, *supra*, 29 L.P.R.A. sec. 185a, provides an economic remedy, indemnity, for the employee who has been dismissed without just cause. Article 2, 29 L.P.R.A. sec. 185b, for its part, establishes a series of circumstances or acts which may lead to a justified dismissal, some imputable to the employee, others to the employer or the company's financial state. *"On the other hand, there is no law whatever that requires the employer, upon dismissing the employee, to do so in a given fashion, either in writing or with prior notice. Nor does our legislation oblige the employer to inform the laborer at the time of the dismissal or thereafter, of the reasons it had to dismiss him, except to defend itself against a court action."* Delgado Zayas, *supra*, p. 123; Article 11 of Act No. 80, *supra*, 29 L.P.R.A. sec. 185.

The company manual which contains the rules and regulations of the job and establishes the standards, benefits and privileges which the employer will enjoy, form *[sic]* a part of the work contract. As a general rule, a pattern of non-compliance with these standards or rules could give rise to a justified dismissal. Nevertheless, the absence of reasonableness of these standards could turn the dismissal into a capricious or arbitrary, and therefore, unjustified one. On the other hand, the benefits and privileges established therein constitute the employee's rights, and a dismissal in violation thereof could also result in an unjustified dismissal.

In interpreting the provisions of the Kodak Employee Manual, which forms a part of the work contract between plaintiff Santiago and Kodak, it should be kept in mind not

[page 9165:]

only that its clauses should be interpreted "*in relation to one another, giving to those that are doubtful the meaning which may appear from the consideration of all of them together*", Article 1237 of the Civil Code, 31 L.P.R.A. sec. 3475, but rather, this being a typical contract of adhesion in the preparation of which the employee did not participate, the obscure or ambiguous clauses must be construed liberally in favor of the employee, thus promoting, to the extent possible, juridical equality in contractual matters. Article 1240 of the Civil Code, 31 L.P.R.A. sec. 3478; *Gonzalez* v. *Coop. de Seguros de Vida de P.R.*, 17 D.P.R. 659, 662 (1986); *Herrera* v. *First National City Bank*, 103 D.P.R. 724, 727 (1975); *R. C. Leasing* v. *Williams Int., Ltd.*, 103 D.P.R. 163, 167 (1974); *Barreras* v. *Santana*, 87 D.P.R. 227, 231-233 (1963); J.R. Velez Torres, *Curso de Derecho Civil*, San Juan, Rev. Jur. U.I.A. (1990), T. IV, Vol. II, Chap. III, p. 95.

V

APPLICATION OF THE RULES OF LAW TO THE FACTS

In its brief, Kodak argues that it was established that plaintiff Santiago's dismissal "*was due to her chronic absenteeism motivated by her inability to perform her functions owing to her health condition and that during her absence another salesperson had to cover the route assigned to her*". It states that plaintiff herself "*admitted engaging in the absences reflected on the attendance cards [and she added that] they were justified by reason of her illness and that she complied with the requirement of notice established in the Employee Manual.*" It goes on to allege that in said Manual, it is established "*that a good attendance record is a condition for working at Kodak and that the absenteeism of employees affects departmental production and imposes an additional burden on the other co-workers*". It also argues that "*log-*

ically, it affects the smooth running and normal functioning of the company". And that because of her disability, plaintiff engaged in a pattern of absenteeism which *"rendered her functions of little or no value to the company"*. From all of this it concludes that the dismissal was not *"out of mere caprice on the part of the company or without reason relating to the smooth and normal functioning of the company"*. Article 2, Act Number 80, *supra*. 29 L.P.R.A. sec. 185b. It concludes its argument by stating that *"Santiago's disability to perform her functions from February 1985 until January 1986 is more than justified cause for her separation"*. It is incorrect.

The Kodak Employee Manual, in addition to establishing the attendance standards to which defendant Kodak alludes, also contains a specific plan concerning the benefits to which an employee is entitled when he has to be absent due to an illness or accident. It becomes obvious then, that the standards of attendance have been tempered by the benefits provided by the company regarding absences due to illness or accidents.

Said Manual, regarding benefits for absences due to illness or accidents, provides that if an employee is absent for more than three (3) days for a medical reason, he must obtain a medical certificate before returning. It also establishes a compensatory payment plan, depending on years of service, for those employees who are forced to go on sick leave for a term of less than one hundred thirty (130) consecutive working days. This is termed *"short-term disability"*. When the employee's illness surpasses this term, he is eligible for the benefits of what is termed *"Long-Term Disability Plan"*.

Let us see what the specific facts of this case were. Plaintiff Santiago began absenting herself from her job in April of 1984. On April 23rd of that same year, she presented a medical certificate from Dr. Juan R. Rios Troche in which he stated that plaintiff was in a physical and mental state of

extreme exhaustion and that he had "*recommended, for her emotional recovery, that she not be subjected to situations which generate anxiety or stress for her and that [she should] stop working for an indefinite time*". She continued absenting herself, for the same reason, during the months of June to September of 1984. On February 19, 1985, plaintiff was again absent from her job owing to illness. In compliance with the provisions of the Manual, she would call periodically to her job to indicate her state of health. The trial court ruled as an issue of fact that plaintiff Santiago complied with Kodak's rules regarding absence owing to illness.

At the time she was dismissed, on May 30, 1985, plaintiff Santiago was enjoying the illness-based benefits which were offered in her work contract, regardless of whether the illness was job-related or not.

Plaintiff was dismissed precisely because she was enjoying said benefits. Defendant Kodak neither alleged nor proved that plaintiff did not qualify for the benefits provided in its own Employee Manual for absences owing to illness. A dismissal, because of supposed "*chronic absenteeism*", under the specific circumstances of this case, is an unjustified one. The benefits provided by the Employee Manual are available for all those employees who are ill and vouch for their illness. Kodak could not justifiably dismiss plaintiff Santiago because she had availed herself of the "*short-term disability*" benefits plan provided by the Employee Manual. The errors indicated were not committed.

Wherefore, judgment shall be entered confirming the partial summary judgment entered on March 27, 1989 and the judgment entered on April 24, 1989, issued by the Superior Court, Carolina Part.

MIRIAM NAVEIRA DE RODON
Associate Justice

JUDGMENT

For the reasons stated in the foregoing Opinion, judgment is entered confirming the partial summary judgment entered on March 27, 1989 and the judgment entered on April 24, 1989, issued by the Superior Court, Carolina Part.

So said and ordered by the Court and certified by the Chief Clerk. Associate Justice Negron Garcia disqualified himself. Associate Justice Rebollo issued a Dissident Opinion.

FRANCISCO R. AGRAIT LLADO
Chief Clerk

NOTES 92 JTS 11

[1] Plaintiff initially filed a complaint based on Act No. 80 of May 30, 1976, as amended, then amended it and made the claim by alleging violation of Article 5a of the Workmen's Compensation Act.

[2] On the advice of counsel, plaintiff went to the Fund four (4) days after being fired.

[3] See also concurring opinions of Associate Justice Rebollo-Lopez and Hernandez-Denton in *Sifontes Ramos* v. *Oliver Exterminating Services Corporation*, of April 5, 1991, 128 D.P.R. ____ (1991), 91 J.T.S. 37.

[4] Deposition, p. 62.

[5] The Employees' Manual of Kodak Caribbean, Ltd., provides the following table:

"TABLE FOR SICK LEAVE

Years of Service	*Compensation in Working Days*	
	100%	*50%*
1 to 4 years	*30 days*	*100 days*
5 to 14 years	*60 days*	*70 days*
over 15 years	*90 days*	*40 days*

DISSIDENT OPINION ISSUED BY ASSOCIATE JUSTICE REBOLLO LOPEZ — 92 JTS 11

San Juan, Puerto Rico, on January 30, 1992.

We are unable to subscribe and endorse the Opinion issued today by a majority of the members of the Court in the instant case.

The Opinion issued, in open violation of the definitive and repeated rule of case law that the Workmen's Accident Compensation Act must be liberally interpreted in favor of the worker or employee, erroneously limits and restricts the rights thereof, unduly benefiting the employers, based on a restrictive construction of said Law.

On the other hand, the majority Opinion is one which is not only juridically incorrect but contradictory. In our humble consideration, it cannot have any other effect but to utterly confuse our trial courts and the professional class; a situation which, instead of fostering the simplification of labor-management controversies, will have the effect of considerably augmenting, and complicating, litigation in this area of law at the trial court level.

Unfortunately, we have not had the necessary time to state in writing, adequately and specifically, the grounds in support of the above assertions. Perhaps, in the near future, we shall have the opportunity to do so. Nevertheless, we could not remain silent in the face of the grave injustice committed, against the working class in general and the litigant in particular, by the majority Opinion issued in the instant case.

FRANCISCO REBOLLO LOPEZ
Associate Justice

JURISPRUDENCE OF THE
SUPREME COURT OF PUERTO RICO

January 15, 1993 Vol. XVI - No. 12 1992-93

92 JTS 175

IVAN PORTO AND HIS SPOUSE, MILDRED SIURANO, ET AL.,
PLAINTIFFS-APPELLEES

v.

BENTLEY PUERTO RICO, INC., ET AL.,
DEFENDANTS-APPELLANTS.

No. RE-89-123
JUDGMENT OF THE SUPERIOR COURT, MAYAGUEZ PART
THE HON. ANGEL GONZALEZ ROMAN, JUDGE

REVIEW

San Juan, Puerto Rico, December 23, 1992

CITED AS JTS 175

OPINION OF THE SUPREME COURT WRITTEN BY

MR. ASSOCIATE JUSTICE REBOLLO LOPEZ

Attorneys for Appellant: Carl Schuster & Anibal Irizarry (Law Firm of McConnell, Valdes, Kelley, Sifre, Griggs & Ruiz Suria.
Attorney for Appellees: Enrique Alcaraz Micheli (Law Firm of Ferrer and Alcaraz).

DAMAGES: LIBEL AND DEFAMATION.

Mr. Porto was fired from his job for allegedly having wrongfully appropriated a company vehicle. The discharged

employee and his wife filed a lawsuit for damages against the employer, alleging false imputations in the letter of dismissal (wrongful appropriation of the vehicle). The Superior Court found for plaintiffs, determining that the letter of dismissal falsely imputed the commission of a crime to plaintiff, which damaged his reputation. The defendants appealed to the Supreme Court. Said Court, in an opinion written by Mr. Associate Justice Rebollo Lopez, revoked the decision of the lower court, ruling that the requirements of *"publication"* of the defamatory information had not been met and that, in any case, intracorporate publication or communication is conditionally privileged. Mr. Associate Justice Alonso Alonso wrote a Concurring Opinion. Mr. Associate Justice Fuster Berlingeri wrote a Dissenting Opinion.

NORMATIVE SUMMARY

1. *Constitutional Law, Right to Privacy, Damages, Libel and Defamation.*
In Puerto Rico, the main source of protection against defamatory expression is the Constitution of the Commonwealth of Puerto Rico (Article II, Section 8).

2. *Id., Freedom of Speech and of the Press.*
The right to privacy recognized in Section 8 of Article II of the Constitution of the Commonwealth of Puerto Rico — manifested through the defamation action — is opposed to the fundamental right of freedom of speech and of the press recognized in Section 4 of Article II.

3. *Id.*
The force of the provisions of the Libel and Slander Act (32 LPRA sec. 3141) is conditioned on not being incompatible with the constitutional right that governs in the area of freedom of speech and of the press, and the right to privacy, under the constitutions of Puerto Rico and the United States.

4. *Damages, Libel and Slander.*
Puerto Rico can regulate in the area of libel and slander as long as absolute liability is not imposed in cases in which the claimant is a *"private figure."* For that reason, the norm requiring negligence governs in the imposition of liability in all damages actions for libel brought by private persons. The norm of absolute liability, or liability without fault or negligence, cannot govern.

5. *Id.*
Action for defamation (libel and slander) is one of compensation for damages aimed at vindicating the social interest in the reputation of the person. Plaintiff must prove that the information published is false and that its publication caused him real damages.

6. *Id.*
In order for a plaintiff to prevail in defamation actions where the plaintiff is a private figure and the defendant outside the media, and the exercise of freedom of speech is present, plaintiff must prove negligence on the part of the defendant in publishing the information.

7. *Id., Publication Requirement.*
One of the essential elements in a cause of action for libel between private persons is the *"publication"* of the false and defamatory expressions. The element of publication exists when the defamatory statement is communicated to a third person, that is, someone other than the person defamed. Defamatory words or statements made to the defamed person himself does not constitute publication, unless a third person learns of the conversation. The element of *publication* does not exist when it is the affected person himself who communicates the defamatory statements to third persons.

8. *Id., Labor Law*
In the area of labor-management relations, any *"external"* communication of the libelous statement by the company to a person other than the affected employee automatically contains the element of publication.

9. *Id.*
In the area of labor-management relations, the element of *"publication"* is present in communications regarding an employee among members of the employer corporation. This is due to the fact that the reputation of the affected employee in his job clearly is impaired by defamatory intracorporate communications. Should the defamatory statements made by a corporate officer about a particular employee become known to the other employees of the company, they affect the opinion and respect the other employees have for the employee in controversy.

10. *Id.*
A person's reputation at his job can be impaired by any intracorporate communication; if such a communication is proved, the element of *"publication"* is satisfied for a libel or defamation action.

1. *Id.*
Communication between the superior of the discharged employee (plaintiff) and the company's personnel director regarding the reason for the dismissal does not constitute an intracorporate communication for purposes of satisfying the element of publication in a libel action.

12. *Id., Conditionally Privileged Communications.*
In the area of labor-management relations, common law has recognized the need for and importance of conditional immunity to promote the free flow of communication between employer and employee. The existence of restricted privilege has extended to the following communications: communi-

cations from the employer to the managers or supervisors of a dismissed employee informing them of the reasons for the dismissal; communications to prospective employers informing them of the reason the employee was dismissed; statements made on employees' performance evaluation sheets; reference information about an employee to other potential employers; communications between supervisors and personnel employees.

13. *Id.*
There is conditioned privilege for employers to communicate freely the reasons for the dismissal of an employee to those persons with a right to that information.

14. *Id.*
Communication by a dismissed employee's manager and supervisor to the company's personnel director informing him of the reasons the employee was dismissed (alleged wrongful appropriation of a company vehicle) is privileged.

FULL TEXT OF THE OPINION

Appellee Ivan Porto worked in the materials department as a receiving clerk for appellant corporation Bentley Puerto Rico, Inc. He worked for said company for two years and three months under an employment-at-will contract.

Appellant company had a single motor vehicle (a Ford van) assigned to the purchasing department. Said vehicle was assigned to a driver or chaffeur, who used it during the company's business hours. Outside of business hours, the vehicle only could be used with the authorization of the purchasing supervisor, or other Company officer, in cases of emergency or accident. When the driver of the vehicle ended his shift, the keys to the vehicle were kept in one of the drawers of the desk of Mrs. Carmen Delia Vargas, supervisor of the purchasing department.

Such being the situation, during the week of August 9, 1985, plaintiff-appellee Ivan Porto received authorization from his immediate supervisor, Mr. Luis J. Berga, materials manager, to use the vehicle when he was required to work overtime, outside the company's regular business hours. Under the authorization, the appellee was obliged to return the vehicle before the start of business on the following day.

On Tuesday, August 13, 1985, appellee used the company's automobile; this was because he missed the ride a co-worker was to provide him and his personal car was still out of service. On that particular day, plaintiff did not obtain the corresponding authorization from his immediate supervisor, Luis Berga, since Berga was in the United States. Nor did he obtain authorization from any other company officer. In view of this situation and because of the hour he finished working,[1] appellee informed the only other employee who was still on the premises, Mr. Andres Santos,[2] that he would use the company vehicle. Appellee then entered the office of the purchasing supervisor, took the keys to the vehicle, and drove off in it. Appellee stopped at the main gate to the plant and notified the guard who was on duty that he was using the company vehicle. Plaintiff-appellee returned the vehicle before 7:00 a.m. the following day.

Upon his return to Puerto Rico, Mr. Berga conducted an investigation into the incident. On August 18, 1985, Mr. Ivan Porto was dismissed from his job. On that date, Mr. Berga handed appellee a letter of dismissal in which it was stated that he was being dismissed for having violated Rule 2 of the Company's Rules of Conduct, which sanctioned *"wrongfully appropriating property of the company or of another employee."*[3]

Subsequently, on June 5, 1988, Mr. Ivan Porto and his wife, in their personal capacity and in representation of the legal partnership of community property and of their minor children, filed suit for damages against appellant corporation in the Superior Court of Puerto Rico, Mayaguez Part. In the suit, they claimed damages of $100,000.00 for the alleged false,

slanderous and libelous imputations made against Porto by his employer in firing him. The suit alleged that at the time of dismissal, appellee Porto was falsely accused of having wrongfully appropriated the company vehicle and that said accusation arose from the letter of dismissal dated August 16, 1985.[4]

Defendant-appellant answered the complaint, and after the corresponding procedural actions, the court of first instance entered judgment in favor of plaintiff. As a question of fact and of law, the court of first instance determined that the letter of dismissal falsely imputed the commission of a crime to plaintiff and that said letter caused damage to his reputation.[5]

Dissatisfied, defendant-appellant sought review of the decision by this Court. In synthesis, appellant alleged that the court of first instance erred in imposing liability on the appellant corporation when the essential elements for a cause of action independent of the dismissal had not been established, with the exclusive relief being the severance pay established by Act No. 80, which the corporation paid; that the court erred in concluding that libelous statements were made when the requirement of *"publication"* was absent; that it committed a serious error in weighing the evidence and concluding that plaintiff had authorization to use the vehicle; and that it erred in granting certain items of damages which were not supported by the evidence.[6]

The review requested was granted. Both parties have appeared. We are now ready to resolve the appeal and proceed to do so.

I

In this jurisdiction the general rule, regarding the matter in controversy, is to the effect that a laborer or worker hired under an employment-at-will contract who is dismissed without just cause is entitled only to the exclusive relief provided under Act No. 80 of May 30, 1976, 29 L.P.R.A. sec. 185a-186i; *Rivera* v. *Security Nat. Life Ins. Co.*, 106 D.P.R.

517, 527 (1977); *Arroyo* v. *Rattan Specialties, Inc.*, 117 D.P.R. 35, 65 (1986). Said statute provides for indemnification equivalent to one month's salary plus one week of compensation for each year of service with the employer. (29 L.P.R.A. sec. 185(a)).

Nevertheless, in *Rivera* v. *Security Nat. Life Ins. Co.*, *supra*, p. 527, we recognized that the relief provided in the labor laws ... *"does not exclude the civil liability of an employer for tortious conduct incurred in for reasons other than the mere violation of (these laws)."* In other words, with respect to a mere dismissal without just cause, an employee only has available the relief provided by Act No. 80, *supra;* that notwithstanding, if other tortious actions that are independent of the dismissal coincide with it, then the employer can he held liable on the basis of said conduct.[7]

In the case before us, plaintiff-appellee claimed damages caused, not for the mere dismissal carried out by the employer, but rather for the alleged defamatory imputations made by the employer in the letter of dismissal. This cause of action of damages for defamation is independent of the dismissal of the employee, so if the plaintiff-appellee establishes and fulfills the requirements of said action, the employer is obliged to redress the damages caused to plaintiff.

II

This case revolves around a libel action within an employer-employee relationship, in which both parties are *"private persons"* and the alleged defamatory statement is not of public or general interest. In our jurisdiction, the principal source of protection against defamatory expression is the Constitution of the Commonwealth of Puerto Rico. Section 8 of Article II of our constitution recognizes the right of *"every person to protection against abusive attacks on his honor, reputation and private or family life."* This right, which is manifested through action for defamation, is in opposition to the fundamental right of freedom of speech and of the press, Article

II, Section 4 of the Constitution of the Commonwealth of Puerto Rico. *Mendez Arocho* v. *El Vocero de P.R.*, 92 JTS 94; *Villanueva* v. *Hernandez Class*, 91 JTS 58, 129 DPR ____ (1991); *Clavel* v. *El Vocero de P.R.*, 115 DPR 685, 690-691 (1984); *Cortes Portalatin* v. *Hau Colon*, 103 DPR 734, 738 (1975).

On the other hand, since the beginning of the century and before our Constitution of 1952 was adopted, protection against defamatory statements in our jurisdiction arose from the Act of February 19, 1902, which established civil action for damages in cases of libel and slander in Puerto Rico. 32 L.P.R.A. Sec. 3141, et seq.[8] Consequently, the *"force of our Libel and Slander Act is conditioned, naturally, on its application not being incompatible with the provisions of our Constitution cited above . . . and the judicial interpretations of the U.S. Supreme Court with respect to the First Amendment of the Constitution of the United States."*[9] *Villanueva* v. *Hernandez Class*, *supra*, p. 8695; *Clavell* v. *El Vocero de P.R.*, *supra*, p. 738; *Cortes Portalatin* v. *Hau Colon*, *supra*, p. 690; *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 348-349 (1974).

In view of the decision of the U.S. Supreme Court in *Gertz* v. *Welch, Inc.*, *supra*, pages 345 and 347, Puerto Rico can legislate in the area of libel and slander as long as absolute liability is not imposed in cases in which the claimant is a *"private figure."* In other words, in our jurisdiction the governing standard is the one that requires liability, based on negligence, in all libel damages suits brought by private persons. *Torres Silva* v. *El Mundo*, 108 D.P.R. 415, 422 (1977); *Romany* v. *El Mundo, Inc.*, 89 D.P.R. 604 (1963). In this way, the absolute or no-fault liability that arose from our Libel and Slander Act, *supra*, was eliminated.[10]

Action for defamation (libel and slander) is one of *". . . redress for damages aimed at vindicating the social interest in the reputation of a person." Torres Silva* v. *El Mundo, Inc.*, *supra*, pp. 423-424. The plaintiff in a libel case must prove that the information or statement published is false and defamatory,[11] and that he suffered real damages as a result

of its publication. *Torres Silva*, *supra*, p. 427. In the case before us, since the plaintiff is a private figure, he must establish that the publication was done negligently, *Gonzalez Martinez* v. *Lopez*, 118 D.P.R. 190, 192-193 (1987), as this concept is understood in the field of damages law. In synthesis, when the plaintiff "*. . . is a private figure and the defendant is outside the press and the exercise of freedom of speech is present, in order for the action to prosper the former must demonstrate the existence of negligence . . .*" *Gonzalez Martinez*, *supra*, p. 196.[12]

III

It is patently clear that one of the essential elements of a cause of action for libel between private persons is the "*publication*" of the false and defamatory statement. *Gonzalez Martinez* v. *Lopez*, *supra*, p. 192; *Torres Silva* v. *El Mundo, Inc.*, *supra*, p. 427; H. Brau del Toro, *op. cit.*, note 12, pp. 986-080. The element of publication exists when the defamatory statement is communicated to a third person, that is, someone other than the person defamed.[13] For that reason, the defamatory words or expressions made to the person defamed himself do not constitute publication, unless a third person learns of the communication. *Mulero* v. *Martinez*, 58 D.P.R. 321 (1941); *Irizarry* v. *Puerto Rico Auto Corp.*, 60 D.P.R. 1, 5 (1942); *Jimenez* v. *Diaz Caneja*, 14 D.P.R. 9 (1908); H. Brau del Toro, *op. cit.*; J. Elias Rivera, *El Elemento de Publicidad en una Accion Difamatoria por Calumnia entre personas Privadas Bajo una Estructura Mercantil*, 30 Revista de Der. Prtno. 37, 45 (1990); Smolla, *op. cit.*, Sec. 4.12(1), pp. 4-58 to 4-59; Restatement (Second) of Torts, Sec. 577 (1977); Prosser & Keeton, *op cit.*, p. 797. On the other hand, the general rule is to the effect that the element of publication does not exist when it is the affected person himself who communicates the defamatory statement to third parties.[14] Restatement (Second) of Torts, Sec. 577; Smolla, *op. cit.*, Sec. 4.12(4), p. 4-80; Harper, James &

O. Gray, *op. cit.*, Sec. 5.15, p. 122. With these principles in mind, we will examine how the element of publication is configured in a corporative entity, and, consequently, whether the plaintiff in this case established the fact of *"publication"* of the letter of dismissal. In the first place, in the employer-employee environment, any *"external"* publication of the libelous matter by the company to a person other than the affected employee, automatically constitutes the element of publication. Smolla, *op. cit.*, Sec. 15.92(1), p. 15-5. The difficulty lies in determining whether there the so-called *"intracorporate communications"* constitute publication.

The minority position that rules in some of the U.S. state courts is to the effect that intracorporate communications do not constitute publication to third parties. It has been said, in support of that minority position, that there is no *"publication"* in communications among officers, managers or agents and employees of a corporation, since the corporation *"is communicating to itself."* *Kmart Corporation Inc.* v. *Pendergrass*, 494 So.2d 600 (1986); *Halsell* v. *Kimberly Clark Corp.*, 683 F2d 285 (8th Cir. 1982); *Jones* v. *Golden Spike Corp.*, 623 P.2d 970 (1961); *Monahan* v. *Sims*, 294 S.E.2d 548 (1982); *Commercial Union Ins. Co.* v. *Melikyan*, 424 So.2d 1114 (La. App. 1982); *Prine* v. *Holland-North America Mortg. Co.*, 181 p. 680 (1919).[15]

In contraposition, the majority of the states have adopted the standard, suggested by the Restatement (Second) and Professor Prosser, to the effect that the element of publication is created by communications among members of the corporation. Restatement (Second) of Torts, Sec. 577 (commentary i); W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts*, Sec. 113, pp. 798-799, (5th ed. 1984); Smolla, *op. cit.*, Sec. 15.02(2)(b), pp. 15-7 through 15-8; *Luttrell* v. *United Tel. Sys.*, 683 P2d 1292 (1984); *Frankson* v. *Design Space Int'l*, 394 N.W. 2d 140 (1986); *Cashio* v. *Holt*, 425 So.2d 820 (La. App. 1983); *Pirre* v. *Printing Devs Inc.*, 468 F.Supp. 1028 (1979); *Welch* v. *Chicago Tribune Co.*, 340 N.E.2d 539 (1979).[16] The raison

d'etre of this position is that the employees of a corporation are human beings and that, when they learn of the defamatory statements, the reputation of the affected employee clearly suffers in the workplace.

After carefully analyzing the various legal sources, we are of the opinion that the majority opinion stated above is more in keeping with our needs, aspirations and our sense of justice. There is no doubt whatsoever that false and defamatory statements made by a corporate officer regarding a particular employee, if they become known to the rest of the employees of the company, affect their opinion of and the respect they have for the employee in controversy.[17] It is useful to cite the statements made in the case of *Pierre* v. *Printing Devs. Inc.*, *supra*, on p. 1041:

"*While corporate officers may be . . . the embodiment of the corporation, they remain individuals with distinct personalities and opinions, which opinions may be affected just as surely as those of other employees by the spread of injurious falsehoods. It is this evil that the law of defamation is designed to remedy. To find no inter-personal communication when a corporate employer speaks to a corporate officer would be to ignore the distinct personalities of the human beings involved.*"

In addition, we are of the opinion that the workplace is where an employee is most exposed to suffer harm to his reputation as a result of false and libelous imputations. Intracorporate communications, that have the effect of degrading or denigrating the reputation of an employee, clearly will affect his relations with the other members of the corporation and, possibility, the community in which he lives. We find, therefore, that the reputation of person in his employment can be degraded through any intracorporate communication and if there is evidence of such communication, the element of publication will be satisfied.

From the transcript of evidence submitted in this case, it can be clearly seen that plaintiff did not submit any evidence whatsoever to the effect that defendant-appellant had made

external communications, that is, to persons outside the company, with respect to the alleged defamatory expression (letter of dismissal).[18] The only evidence of the *"publication"* of the letter of dismissal is what occurred at the meeting at which the plaintiff, Ivan Porto, was fired.

The evidence is clear that at that meeting Mr. Luis Berga handed the letter of dismissal to Mr. Porto. The contents of the letter were fully discussed not only between the plaintiff and his supervisor, Mr. Berga, but another member of the corporation, Miss Elvira Alfonso, who was the Personnel Administrator, also was present.[19] On the basis of that, it was alleged that the fact of publication of the letter of dismissal was established, *prima facie*. We do not agree; it was completely logical and reasonable that said officer take part in the meeting. We cannot conceive of the head of personnel of a company not being informed about the persons recruited and the employees discharged.

IV

Even assuming, for the sake of argument, that the letter of dismissal contained information that is false and defamatory and was, in effect, the object of *"publication,"* that fact does not provide the basis for a libel action because the publication is privileged under Secs. 4 and 5 of our Libel and Slander Act,[20] 32 L.P.R.A. Secs. 3144-3145. *Bosh* v. *Editorial El Imparcial*, 87 D.P.R. 285, 304-305 (1963); *Diaz* v. *P.R. Ry. Lt. & Co.*, *supra*, p. 811; *Quinones* v. *J.T. Silva Banking and Commercial Co.*, 16 D.P.R. 696 (1910). Our statute, following Anglo-Saxon common law, established various types of privileged communications, some of which were absolute and others only conditional or restricted. *Diaz*, *supra*, p. 811; *Villanueva* v. *Hernandez Class*, *supra*, p. 8698. To that effect, we have stated that the doctrine of privilege is more restrictive in Puerto Rico than in other common law jurisdictions and, in addition, that it is purely statutory. *Bosh* v. *Editorial El Imparcial Inc.*, *supra*, p. 306; *Diaz*, *supra*.

The doctrine of conditional or restricted immunity is based on the public policy of *"conciliating the interest in individual reputation and other equally legitimate interests."* *Cortes Portalatin* v. *Hau*, *supra*, p. 739. To that effect, we have pointed out that *"privileged information is that which, were it not for the occasion or circumstances, would be defamatory and subject to claim."* *Diaz*, *supra*, p. 812. The communication can be false, but the privilege remains. *Quinones* v. *J.T. Silva Banking and Commercial Co.*, *supra*; *Cortes Portalatin*, *supra*.

In the same way, *"conditional privilege includes the publication of all communications made in good faith regarding a matter in which the author has an interest or with respect to which he has a duty toward others to fulfill. It is considered privileged because the person who uses it must do so in accordance with law and for an appropriate purpose."* *Caraballo* v. *P.R. Ilustrado, Inc.*, 70 D.P.R. 283, 291 (1949); Restatement (Second) Sec. 594-598.

On the other hand, conditional immunity *"is lost"* when defendant *"abuses the privilege."* In *Cortes Portalatin* v. *Hau Colon*, *supra*, we state that privilege disappears if *". . . the communication is made to someone who there is no reason to believe can protect the interests of the author or the community, as the case may be; or if the author gives excessive publicity to the matter; or if the author has improper motives. The fact that other persons incidentally listen to or read a communication made in a reasonable way does not nullify the privilege."* (Citations omitted).

In the labor-management sphere, common law has recognized the need for and importance of conditionl immunity to promote the free flow of communication between employer and employee. The existence of restricted privilege has been extended to different means of communication in the workplace. Although the existence of this restricted privilege is determined on a case-by-case basis, as a point of illustration, the following communications have been held to be conditionally privileged: communications from the *"employer"* to

managers or supervisors of a dismissed employee, informing them of the reasons for the dismissal; communications made to prospective employers informing them of the reason the employee was dismissed; statements made in employee performance evaluations; giving reference information about an employee to other potential employers; communications between supervisors and personnel employees. See: Annot., 60 A.L.R. 3d 1080 (1974) and cases cited therein; Duffy, *Defamation and Employer Privilege*, 9 Employee REL. L.J. 444 (1983); Martin & Bariol, *Potential Libel and Slander Issues Involving Discharged Employees*, 13 Employee REL. L.J. 43 (1987); Commentary, *Defamation in the Workplace: The Impact of Increasing Employer Liability*, 72 Marq. L. Rev. 264 (1989) and cases cited therein; Lewis, Ottley & Mersol, *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. Rev. 797 (1989) and cases cited therein; Smolla, *op. cit.*, Sec. 15.07(2)(a).

In the case before us, appellant argues that the restricted privilege of Sec. 3145 is applicable.[21] In its pertinent part, that Section establishes that malice will not be presumed in communications *"between persons who have business in society or other similar associations."* In *Quinones* v. *J.T. Silva Banking and Commercial Co., supra*, we analyze the scope and significance of this privilege. In *Quinones, supra*, one of the directors of the defendant company noted defamatory information about an employee in a section of the operations log, imputing to him wrongful appropriation of company funds. Although the legitimate purpose of noting this matter was so that the various stockholders, directors, partners and other interested parties would have knowledge of this information, the information became known to other dependents or employees. Nevertheless, this Court found that the matter of reference was a privileged communication. To that effect, we stated that:

"*. . . it is absolutely necessary that a commercial house or company that does business on a large scale, employs a more*

or less large number of employees [and consequently it is] indispensable to include those dependents or employees in the class of persons occupying positions analogous to that of the partners [that sec. 3145 points out]. The fact that the offensive matter was read and commented on by dependents and employees at the defendant bank is a mere incident of the existence of the matter itself, and does not constitute illegal publication [or non-privileged publication] . . ." *Quinones, supra*, p. 701.

Clearly, the occasion to discharge an employee is a legitimate action an employer can have to carry out. Consequently, there exists, for the proper operations of the business or company, a legitimate interest in being able to communicate freely to those persons with a right to know or be informed about the reasons for the dismissal of an employee. In this case, Mr. Luis Berga, as appellee's manager and supervisor, had a duty to discipline his employees and enforce the company's standards of conduct. To that effect, he was the person with interest in the communication, that is, the proper person to handle the dismissal and explain the reasons for it to plaintiff. Similarly, and as an inherent part of his duties, it was legitimate that the contents of the letter be made known to the Company's Personnel Administrator. In summary, the persons who had knowledge of the letter of dismissal were interested parties fulfilling their duties and at the same time the communication was necessary for the free flow of information within the company.

We are of the opinion that, under the facts of this case, there was no "*publication*" of the letter of dismissal in controversy; but even if there had been, said publication would be conditionally privileged. Further, the evidence shows that the communication involved here was much more limited than that carried out in *Quinones, supra*, since the contents of the letter were not divulged to other employees who were not interested parties to said communication.

On the other hand, there is no basis whatsoever in the record to conclude that appellant abused said privilege. In

view of this situation, we are forced to conclude that the court of first instance erred in imposing liability for defamation or harm on appellant corporation.

For the reasons stated above, the Judgment of the court of first instance in this case must be revoked.

FRANCISCO REBOLLO LOPEZ
Associate Justice

DECISION

On the grounds stated in the foregoing Opinion, which forms part of this decision, the Judgment entered by the Superior Court of Puerto Rico, Mayaguez Part, is revoked.

The Court thus pronounces and orders, and the Clerk of the Court certifies. Mr. Associate Justice Alonso Alonso wrote a concurring Opinion. Mr. Associate Justice Fuster Berlingeri wrote a dissenting Opinion.

FRANCISCO R. AGRAIT LLADO
Clerk of the Court

ANNOTATIONS TO 92 JTS 175

1. The demands of his work required plaintiff to remain at the company after business hours, until around 9:00 p.m.
2. The plaintiff stated at the trial that he had not known that Andres Santos only worked as a mechanic; he believed Santos was the person occupying the position of running the company like three other people who ran the company at night. Transcript of Evidence, pp. 49-50.
3. At the time of dismissal, defendant-appellant paid appellee the indemnification provided for under Act 80 of May 30, 1976, or severance pay.
4. The letter of dismissal in its entirety read as follows:

"On Tuesday, August 13, 1985, you entered the office of the purchasing manager and wrongfully appropriated the keys to the official Company Vehicle (Ford van). Without the authorization of any officer of Bentley, you used said vehicle and returned with it on Wednesday, August 14.

Said action is a violation of rule of conduct number two (2), which states "do not wrongfully appropriate the property of the company or of another employee." This being the case, you incurred in conduct unacceptable on the part of an employee of the company.

For this reason, we are notifying you that as of today, August 16, 1985, you are no longer employed by Bentley AHS del Caribe, Inc.

We are enclosing a check covering the total number of vacation days accumulated (11 days). In addition, and as assistance on the part of the company and a sign of good faith, we are including severance pay of one month's salary plus two additional weeks for your two years of service.

Should you have any questions about the amount received, please telephone the Personnel Department."

5. In its sentence, the court ordered the following indemnifications:

a) To the Legal Partnership of Community Property composed of Ivan Porto and Mildred Siurano, for economic loss

at the rate of $5.00 an hour for 2,080 hours annually from August 16, 1985, to January 16, 1089, the sum of $35,535.00, plus the accumulated amount at the rate of $867.00 a month from August 16, 1985, to the date on which the judgment was entered.

b) $15,000.00 to Ivan Porto for suffering and mental anguish.

c) $5,000.00 to Mildred Siurano for suffering and mental anguish.

d) $500.00 to Ivan Jose Ernesto for suffering and mental anguish.

e) $500.00 to Ivan Jose Ismael for suffering and mental anguish.

f) $500.00 to Mildred Dinorah Del Carmen for suffering and mental anguish.

6. In the appeal filed, the court of first instance is imputed to have erred:

"A) . . . in awarding damages within the labor-management context. The court of first instance incurred in serious manifest error and abused its discretion in finding defendant-appellant liable for damages obviating the doctrine of exclusive relief designed under Act No. 80 of May 30, 1976, 29 L.P.R.A. Sec. 185(a) et seq. The Court did not have the power to grant the relief requested because the essential elements for a cause of action independent of the act of dismissal were not established.

B) . . . in concluding that libelous or slanderous imputations were made about plaintiff-appellee that constituted defamation under the Libel and Slander Act of 1902; 32 L.P.R.A. Secs. 3141 et seq. The essential element of publication to third persons required under the statute was not established. In the context within which the allegedly defamatory communication occurred, it enjoyed restricted privilege.

C) . . . in concluding that there was cause of action for defamation when the element of negligence on the part of defendant-appellant in the publication of the letter of dismissal to plaintiff-appellee [sic] was not established either,

when no evidence was presented to support the awarding of the items included in its Judgment. Consequently, they are excessive and have no causal relationship to the evidence presented during the trial. Since they are not supported by the evidence, they constitute an abuse of discretion and denote prejudice and partiality.

D) . . . in judging the evidence contrary to the most rational, just and legal balance of the totality of the evidence received, in concluding that plaintiff-appellee had express authorization to use the company's vehicle. Another of the essential elements to a cause of action, that of the falseness of the publication, was not established.

E) . . . in awarding damages to plaintiff-appellee."

7. It is useful to reiterate what we said in *Arroyo* v. *Rattan Specialties, Inc., supra*, p. 65, to the effect that:

"The fact that the violation of constitutional rights in this case occurred within the context of the labor-management relationship and involved a worker hired under employment-at-will does not imply that the worker has waived his constitutional rights and is impeded from obtaining real and effective relief that vindicates them. Despite the fact that, as a general rule, a laborer or worker hired under employment-at-will can be dismissed for just cause, without cause or for unjustified cause, and that under these circumstances the only law to aid him is that provided under Act No. 80 of May 30, 1976; it is no less true that an exception to this norm is when the dismissal is made with the purpose and intention of frustrating or subverting, or has the effect of frustrating or subverting, a clear public policy. With respect to employment-at-will contracts, labor legislation has intervened to prevent a dismissed worker from being totally helpless economically while he seeks and obtains new employment. Cassasus v. *Escambron Beach Hotel, 888 D.P.R. 375, 379 (1962). Therefore, this legislation cannot operate to deprive the worker of the appropriate relief to efficiently vindicate his constitutional rights."* (Annotations omitted).

8. As is known, our Libel and Slander Act of 1902 comes from North American common law. *Chico* v. *Editorial Ponce, Inc.*, 101 D.P.R. 759, 766 (1973); *Diaz* v. *P.R. Ry. Ll & P. Co.*, 63 D.P.R. 808, 811 (1944). Section 2, 32 L.P.R.A. Sec. 3142, defines libel as follows:

"Libel is understood to mean malicious defamation made publicly against a person in writing, print, sign, photo, figure, effigies or other mechanical means of publication tending to expose that person to public hatred or scorn, or deprive him of the benefit of public confidence and social treatment, or to harm or dishonor him, or other published malicious defamation, as stated above, with the intent of denigrating or maligning the memory of a dead person and discrediting or provoking surviving relatives and friends."

9. It is well to reiterate that these new constitutional elements that govern our Libel and Slander Act, *"even when they have not repealed it in its entirety, have had the effect of significantly modifying it. As an example, we might mention that doctrines that were developed under the aforementioned act, such as the doctrine of the presumption of malice, no-fault liability and the presumption of damages, lack force in our time." Villanueva* v. *Hernandez Class, supra*, p. 8702; *Torres Silva* v. *El Mundo, Inc., supra*, p. 423. *"That, however, should not constitute an impediment to our making an effort to enforce those provisions of our Libel Act that still have force, keeping in mind the ideal of attaining our own or distinctly Puerto Rican law more responsive to our needs and aspirations." Villanueva, supra*, p. 8702, annotation 13.

10. With respect to no-fault liability, this occurs in the following way: if the claimant established that the expression was libelous *per se*, then malice was presumed in the publication; and if the defendant could not prove any of the available defenses, such as the statutory privilege of secs. 3144 and 3146, then the case ended right there in favor of the plaintiff. Only, for example, if the defendant established that the defamatory statement was privileged would the plaintiff have to prove malice in the publication with independent evidence.

11. Although the requirement of negligence, not of malice in publication, is what applies in a private libel action, it is important, nevertheless, to point out that the spoken or published statement must be injurious and defamatory as contemplated in Sec. 3142 (32 L.P.R.A.) of the Act: that is, it must be defamatory with respect to its character and harmful effects. See Herminio Brau del Toro, *Los Danos y Perjuicios Extracontractuales en Puerto Rico*, 2nd Ed., Publicaciones J.T.S., p. 988.

12. The U.S. Supreme Court determined in *Gertz* v. *Welch, Inc., supra*, that if the claimant were a private person, the states could draft standards of liability less demanding than those in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), as long as they were not no-fault liability.

It should be pointed out, however, that the decision of the U.S. Supreme Court in *Dun & Bradstreet Inc.* v. *Greenmoss Builders Inc.*, 472 U.S. 749 (1985), raises serious doubts about the current validity of norm of *Gertz, supra*, with respect to imposition of a minimum of liability (e.g., negligence) in cases in which the plaintiff is a private figure. Legal commentators in the United States believe that after this case, although it is not directly resolved, the states can return to the traditional norm of no-fault liability *(Pre-Gertz)* in cases in which the plaintiff is a private figure and the defamatory statement does not involve a matter of public or general interest. See R. Smolla, *Law of Defamation*, Sec. 3.02(5)-.10 (1986); F. Harper, F. James & O. Gray, *The Law of Torts*, Sec. 5.0. pp. 2-24 (1986); Middleton, *Employers Face Upsurge in Suits over Defamation*, The Nat'l L.J., May 4, 1987; Comment, *Defamation in the Workplace: The Impact of Increasing Employer Liability*, 72 Marq. L. Rev. 264 (1989); Comment, *American Defamation Law: From Sullivan Through Greenmoss and Beyond*, 48 Ohio St. L.J. 513 (1987); Lewis, Ottley & Mersol, *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 Mo. L. Rev. 797 (1989); *Dun & Bradstreet Inc.* v. *Greenmoss Builders Inc., Does the Actual Malice Standard of Gertz* v. *Robert Welch,*

Inc. Apply to Speech on Matters of Purely Private Concern?, 14 Pepperdine L. Rev. 337 (1987); 3 Restatement (Second) of Torts, Sec. 580B (1977). In Puerto Rico, however, we have retained the requirement of negligence for all actions in which the claimant is a private person. *Gonzalez Martinez, supra*, p. 196.

13. It is understood that the defamatory expression is effected through any form of "*writing, print, sign, photo, figure, effigies or other mechanical means of publication tending to expose said person to public hatred, . . . or to harm him in his business . . .*" 32 L.P.R.A. Sec. 3141. In addition, "*. . . [t]o sustain the charge of having published, or libel, it is not necessary that the words subject of the suit have been read by any person; sufficient proof of the fact would be that the accused knowingly left or exposed the libel in such a way that it could have been read by any other person.*" 32 L.P.R.A. Sec. 3148. In *Jimenez* v. *Diaz, supra*, p. 12, we state that "*. . . it is not necessary that the communication be directed to the person who is the object of the libel, since generally these communications are directed to a different person, and publication is effected when the latter shows it to a third person.*"

14. As an exception to this general rule, the doctrine of "*compelled self-publication*" has arisen in the labor field. This doctrine allows the dismissed employee to satisfy the publication requirement if, in looking for new employment, he is in any way obliged to reveal or repeat the reason for his dismissal (that contains defamatory information) to a prospective employer and, finally, that the original employer could foresee that said communication would take place. In this way, the original employer is liable for the defamation even though the libelous expression is published to third parties exclusively by the plaintiff. In this case, it is unnecessary to express ourselves on whether we adopt said doctrine in this jurisdiction since the plaintiff did not present any evidence whatsoever demonstrating that he was obliged to reveal the reasons for his dismissal when seeking new employment. The communication, if any, that he had with other possible em-

ployer is merely speculative. Transcript of Evidence, pp. 38-39. See J. Elias Rivera, *op. cit.*; *Lewis* v. *Equitable Life Assurance Society*, 389 N.W. 2d 876 (Minn. 1986); *McRinney* v. *County of Santa Clara*, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980); *Colonial Stores Inc.* v. *Barrett*, 38 S.E. 2d 306 (1946); *Grist* v. *Upjohn Co.*, 168 N.W. 2d 389 (1969); Mota, *Publication of Allegedly Defamatory Matter by Plaintiff ("Self-Publication") As Sufficient to Support Defamation Action*, 62 A.L.R. 4th 616 and cases cited therein; Langvardt, *Defamation in the Employment Discharge Context: The Emerging Doctrine of Compelled Self-Publication*, 26 Duq. L. Rev. 227 (1987); Commentary, *Defamation in the Workplace: The Impact of Increasing Employer Liability*, 72 Marq. L. Rev. 264 (1989); Smolla, *op. cit.*, Sec. 15.02(3)(a)-(3)(c), pp. 15-8 through 15-13.

15. See also: Smolla, *op. cit.*, Sec. 15.02(2)(a); Restatement (Second) of Torts, Sec. 577; Annotation, *Defamation: Publication by Intracorporate Communication of Employee's Evaluation*, 47 A.L.R. 4th 674; Recent Decisions, *Tort-Libel and Slander-Communications Between Employees of Company Concerning Company Business Held Sufficient Publication to Subject Company to Liability*, 38 Va. L. Rev. 400 (1952).

16. See also: Commentary: *Defamation in the Workplace: the Impact of Increasing Employer Liability*, 72 Marq. L. Rev. 264 (1989); Annotation, *Defamation: Publication by Intracorporate Communications of Employer's Evaluation*, 47 A.L.R. 4th 674; Note, *Libel and Slander-Intracorporate Communications as Publications to Third Persons*, 33 U. RAN L. Rev. 759 (1985).

17. As author Rodney Smolla correctly pointed out, under that doctrine the only intracorporate expression that would not provide the basis for publication would be a case in which the libelous statement was made only between the corporate officer and the employee with no evidence of third persons present at the meeting or that the defamatory matter had been

read by other members of the corporation. Smolla, op. cit., sec. 15.02(3)(a), p. 15-8.

18. In the cross-examination of plaintiff Ivan Porto, attorney for defendant asked the following:

"*ATTY. IRIZARRY:*

Q. Very well. Witness, is it true that since your dismissal from the company you have no information, that is, no officer, nor executive, nor supervisor nor representative of the company has been publicly divulging to other people the reason for your dismissal?

A. I don't know. If they have done so, I don't know it, and if they haven't done so, I don't know it.

Q. Is it true that up to today the Bentley company has not sent information to anyone, to any company, entity or person, in writing or verbally, about the reasons for your dismissal?

****

A. I know, I have no way of knowing what management is doing up there because really it's not . . .

Q. You don't know?

A. No, I don't know.

****

Q. Witness, do you know whether any relative of yours, your wife or your children, know or have information that (sic) the company, any executives, officers or supervisors have made statements against you.

ATTY. ALCARAZ (Attorney for plaintiff)

Your Honor, if this is to establish the fact, we'll stipulate that we have no evidence whatsoever that the company or management has divulged in any way that he was fired for stealing property from the company."

19. In the cross-examination of plaintiff, the following questions were asked:

ATTY. IRIZARRY:

Q. When you were given the letter of dismissal, what persons were present at the meeting?

A. Mr. Luis Berga was there.

Q. What other person, if any, was present besides yourself?

A. At the moment the letter was given? Only he and I were present. Later Mrs. Lorenzo or Miss Lorenzo came in.

Q. Who came later . . .?

A. Elvira Lorenzo.

Q. Is it true that at that time she, Dona Elvira, was in charge of personnel?

A. Yes, she was . . . she was the person at the head of . . .

Q. And no one else, apart from yourself and those two people, were present during the communicaton, eh . . . in which your dismissal was discussed, correct?

A. Yes, that's right. Transcript of Evidence pages 41 and 42."

In the direct of Mr. Luis Berga, the lawyer asked the following question:

ATTY. IRIZARRY:

Q. Witness, can you tell us what happened at the time of the dismissal?

WITNESS:

Yes, that was a Friday afternoon, Mr. Porto was brought to my office . . . we talked about . . . exactly about the contents of the letter. We were together talking about this for three hours . . . in part of . . . the conversation, Miss Elvira Alfonso took part, she was the . . . Personnel Administrator and it was about the contents of the letter . . ." Transcript of Evidence, page 85.

20. Section 3144

"It will not be understood as malicious, nor shall its publication in any legislative, judicial or other proceeding authorized by law be considered as such. Publication as follows will not be considered malicious:

One: In the conduct of official duty;

Two: In fair and true report of judicial, legislative or official proceedings, or any other proceedings, or in anything said in the course of said proceedings;

Three: To a government official, backed by probable cause, with the intention of serving the public welfare, or to obtain relief for harm done to a particular person."

Sec. 3145.

"Malice will be presumed to exist in any defamatory or slanderous writing that is directed to a person other than a relative to the third degree, or a person the author has under his guardianship, or when such a communication is exchanged between persons who have business in the society or other similar association."

21. With respect to Sec. 3145, *supra*, it is important to point out that the Legislature limited the scope of the restricted privilege of common law to four classes of communication. For that reason, this Court is impeded from importing other types of privilege from common law since that task is within the competence of the Legislature itself. *Díaz*, *supra*, pp. 815-816.

CONCURRING OPINION OF MR. ASSOCIATE JUSTICE ALONSO ALONSO
92 JTS 175

San Juan, Puerto Rico, December 23, 1992

I concur with the results reached in the Majority Opinion of the Court, but because the plaintiff failed to prove that defendant was negligent or that there was a causal relationship between this and the alleged harm under the provisions of Article 1902 of the Puerto Rico Civil Code, 31 LPRA Sec. 5141. Let me explain.

The complaint filed by plaintiff was grounded in Article 1802. The Judgment entered by the court of first instance also was based on said provision. (See page 7 of the Judgment).

In this case it is not necessary to resort to the Libel and Slander Act, 32 L.P.R.A., sec. 3141, et seq., since it deals with a private person bringing an ordinary action for damages against his employer, an action we have authorized in *Rivera* v. *Security Nat. Life Ins. Co.*, 1206 D.P.R. 517, p. 527 (1977) in actions brought in relation to Act No. 80 of May 30, 1976, 29 L.P.R.A. sec. 185a - 185l. Once again the majority of this Court incorrectly resorts to the Libel and Slander Act to settle an action covered under Art. 1802 of the Puerto Rico Civil Code.

In *Mendez Arocho* v. *El Vocero* res. June 29, 1992, 92 JTS 94 (dissenting opinion by Mr. Associate Justice Alonso Alonso) we censured this practice of confining these damages actions to those already surpassed precepts of the Libel and Slander Act of 1902, obviating the reason to sue defendants under Article 1802 of the Civil Code. In that case, citing the words of Professor Serrano Geyls, we pointed out that the modern tendency of this Court was to adjudicate cases under the applicable constitutional doctrines and Art. 1802 of the Civil Code. Today, once again this Court adjudicates the claim before it under the precepts of the 1902 Act, outside our civil legal system.

On the basis of the foregoing, it is unnecessary to enter into consideration of whether the communication was made public under the Libel and Slander Act or whether it was a privileged communication, or whether it was made in a malicious way.

I should also stress that the majority opinion of the Court uses the standard of negligence in analyzing this case under the Libel and Slander Act. On p. 10, it states the following: "*In other words, in our jurisdiction the standard that requires liability based on negligence governs, in all damages actions for libel brought by private persons.*" (Emphasis provided).

Nevertheless, a few months ago, on June 29, 1992, in resolving the case of *Mendez Arocho* v. *El Vocero, supra*, which dealt with private persons suing for damages, and where this Court erroneously applied the Libel and Slander Act, when faced with the problem that said act requires that

plaintiff prove defendant's intent when a deceased person is defamed, this Court stated that plaintiff had to prove *"that defendant acted in an intentional way or with gross negligence and serious disregard for the truth"* (emphasis provided). That is a different standard for cases in which a deceased person is defamed.

In view of having different standards, with the confusion that creates, for what is simply and plainly an action for damages by a private person, it is sounder to hold that all of these actions are governed by Art. 1802 of the Civil Code and apply a uniform standard: that of negligence.

On the other hand, in this case the employer simply was not negligent in dismissing one of its employees under the provisions of Act No. 80 in the way it was done. What other way could it have been done? Obviously, the employer had to notify the affected person of his dismissal, giving him the reason for it, and notify the head of personnel as well. In view of those facts, neither is there any causal relation between the employer's action and plaintiff's alleged mental damages and apprehension. For all of the foregoing, I concur with the result.

RAFAEL ALONSO ALONSO
Associate Justice

DISSENTING OPINION OF MR. ASSOCIATE JUSTICE FUSTER BERLINGERI
92 JTS 175

San Juan, Puerto Rico, December 23, 1992

In this case, a company employee who had express authorization to use a company vehicle not only was discharged suddenly for using said vehicle but also had to suffer the false accusation, in his letter of dismissal which is known to coworkers and forms a permanent part of his record in the com-

pany, of having committed the crime of wrongful appropriation.[1]

In its opinion, the majority of the Court clearly recognizes that the contents of the letter in question were known to the other employees of the company. In effect, in the last paragraph of Part III of the majority Opinion the following is expressly stated:

"*The contents of the letter were fully discussed not only between the plaintiff and his supervisor, Mr. Berga, but another member of the corporation, Miss Elvira Alfonso, who was the Personnel Administrator, also was present.*"[2]

Even further, the majority also affirms that "*there is no doubt whatsoever that false and defamatory statements made by a corporate officer regarding a particular employee ... affect the [other employees') opinion of and the respect they have for the employee in controversy,*" adding that "*intracorporate communications that have the effect of degrading or denigrating the reputation of an employee, clearly will affect his relations with other members of the corporation and, possibly, the community in which he lives,*" finding, in consequence, that "*... the reputation of a person in his employment can be degraded*" through such intercorporate communications.[3]

The foregoing notwithstanding, the majority surprisingly tells us that even if the letter of dismissal contains false and defamatory information, and the reputation of the employee has been denigrated, the employer cannot be held liable for injury to the employee because our legal system supposedly establishes a privilege that allows defamatory intracorporate communications to be made with impunity, in order to protect "*the free flow of information within the company.*" The majority on the Court, in effect, gives employers carte blanche to defame and slander their employees in the interest of "*promoting the free flow of communication between employer and employee.*"

I don't see how they can arrive at this unheard of result on the basis of the provisions of Section 5 of the Libel and Slander Act (32 L.P.R.A. 3145). That section does not create a privilege of immunity. It merely establishes when the presumption of malice exists and when it does not. The only effect of such a presumption is that it eliminates proving the damages caused. If the presumption of malice in that section does not apply to the concrete controversy before the Court, that does not free the defendant from liability. He can still be liable if plaintiff, in effect, proves the damages caused. *Quinones* v. *J.T. Silva*, 16 D.P.R. 695 (1910). What is involved, then, is a mere provision about the weight of the evidence, not about the immunity of liability. *Jimenez* v. *Diaz Caneja*, 14 D.P.R. 9 (1908). Thus the Court states and clearly explains in *Romany* v. *El Mundo*, 89 D.P.R. 604 (1903) when it finds that the special libel and slander act of 1902 does not impede indemnification for damages caused if it is proved the defendant acted negligently, even when the presumptions established by said special law "*. . . that alter the standards of evidence normally applicable with respect to the need to prove a fact or on whom the burden of proof lies*" are not applicable. (*Supra*, page 618, emphasis provided). Thus we also reiterated most recently in indicating that once the evidentiary privilege of Section 5 of the Libel and Slander Act has been established, "*. . . the burden of proof . . . is entirely on the plaintiff.*" *Cortes Portalatin* v. *Hau Colon*, 103 D.P.R. 734, 740 (1975).

Even if it could be demonstrated that the unheard of result arrived at by the majority of the Court in this case were required by the old Libel and Slander Act of 1902, that would not be finally determinant in the question before us. We have said repeatedly that from 1952 on, "*many solutions once derived from the 1902 law*" are not sustainable because since that date "*the principal source of protection against injury is . . . the Constitution, not the 1902 law. That law survives only to the extent that it is compatible with the Constitution.*" *Cortes Portalatin* v. *Hau*, *supra*; *Garcia* v. *El Mundo*, 108

D.P.R. 174 (1978); *Clavell* v. *El Vocero*, 115 D.P.R. 685 (1984); *Villanueva* v. *Hernandez*, 91 JTS 58, 129 D.P.R. ____ (1991). I don't see how the majority of this Court can recognize a situation of clear attack on the honor and reputation of a person, which our Constitution repudiates without doubt, and at the same time say that such an attack can be made with impunity to protect some intracorporate communications. To give priority to such communications at the expense of the honor and reputation of an individual is to clearly scorn the clear mandate of the Constitution. I, at least, am not willing to place mere employer convenience above the most basic value of respect for the person consecrated in our fundamental law. For that reason, I dissent.

JAIME B. FUSTER BERLINGERI
Associate Justice

ANNOTATIONS TO THE DISSENTING OPINION OF MR. ASSOCIATE JUSTICE FUSTER BERLINGERI 92 JTS 175

1. Such were the facts that the Court of first instance found proved. The majority on this Court makes no statement whatsoever to the effect that the sentencing court incurred in perjury or serious error in its evaluation of the evidence.
2. In addition to the two people from the company alluded to in the above quotation, it would seem logical to suppose that at the least a secretary was involved in the preparation and filing of the letter, as usually occurs in companies, and that she also had direct knowledge of the matter.

Nor should we ignore the reality of informal communications about such matters in offices in Puerto Rico. A dismissal, such as the one we are talking about, is, in our experience, precisely the type of event that generates comment and gossip among co-workers. Paraphrasing the insightful observation of that eminent Puerto Rican jurist, Raul Serrano Geyls, judges

should not be so naive as to generally known common experience.

3. The position of the majority with respect to whether or not there was *"publication"* in this case is really incomprehensible. The majority dedicates all of the extensive third part of its opinion to a discussion of the Anglo-Saxon doctrine of what constitutes *"publication"* as an essential element in a defamation action, particularly in the labor sphere. As part of that discussion, the majority expresses its rejection of the position adopted by some state supreme courts that the element of *"publication"* cannot be created through intracorporate communications. In its place, the majority adopts the opposing position, also upheld in numerous U.S. state jurisdictions and by the principal commentators of the United States, that *"publication"* exists if there is any intracorporate communication that is libelous. Nevertheless, after stating the grounds for adopting this position, and expressly acknowledging that in this case there was at least one such intracorporate communication, mysteriously, without explanation, the majority tells us that it does not agree that the element of *"publication"* has been established here, not even *prima facie*. The majority, then, comes to an incoherent conclusion, obfuscating the doctrinaire distinction that it previously so painstakingly formulated.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

CASE NO. 80-00259 (SEK)
ADV. 83-0183
September 12, 1990
Hato Rey, P.R.
8:30 a.m.

In re:
EL SAN JUAN HOTEL CORPORATION

TRIAL ON ADV. 83-0183 OR MARSHALL KAGAN

HEARING BEFORE THE HONORABLE SARA DE JESUS
UNITED STATE BANKRUPTCY COURT JUDGE

Appearances:

For the Trustee:	Daniel Dominguez, Esq.
For the Co-Defendant:	Attorney Quilichini, Esq.
For the Plaintiff/Movant:	Marshall Kagan, pro se
Court Recorder:	Yanira Mercader

Proceedings recorded by electronic recording.
Transcript prepared by transcription service.

support a conflict of interest allegation and he takes no action?

A. I think he should bring them to the attention of the attorney. That's what he could do. However, the attorney must determine whether he has a conflict or not. That doesn't mean that the trustee couldn't bring the matter and if the trustee feels that there really is a conflict he could even like any other creditor could take the matter to the Court. But I think it's the primary obligation of the attorney to determine whether he has a conflict of interest.

Q. But the final determination is the trustee's?

A. No. I think the final determination, if the attorney

does not think he has a conflict of interest, is a matter that should be brought to the attention of the Court.

Q. By who?

A. By anybody who feels they have a conflict of interest. By you in this case. For instance, you could have brought this before the Court.

Q. By the trustee — the trustee can bring it before the — should bring it before the Court.

A. Obviously he didn't feel I had a conflict of interest. He didn't bring it. When he thought — when you raised the issue he wrote a letter, which is self explanatory, regarding the assertion and he invited me to meet with him. My answer to the trustee was that if only worry — that even a worry by him that

IN THE SUPREME COURT OF PUERTO RICO

RE-86-206 Review

ESTHER GARCIA PAGAN,
PLAINTIFF-APPELLANT
v.
SHILEY CARIBBEAN, SHILEY LABORATORIES, INC., AND PFIZER, INC.,
DEFENDANTS-APPELLEES

MR. JUSTICE HERNANDEZ DENTON
delivered the opinion of the Court.

San Juan, Puerto Rico, June 30, 1988

In *Odriozola* v. *S. Cosmetic Dist. Corp.*, 116 D.P.R. 485 (1985), we did not resolve if under Act No. 100 of June 30, 1959 (29 L.P.R.A. § 146 *et seq.*), the emotional damage caused to an employee as a result of a discriminatory dismissal is compensable.[1] Today we decide in the affirmative. Esther Garcia Pagan brought a complaint against her employer, Shiley Caribbean, seeking compensation for pecuniary, bodily, and mental damages sustained as a result of the discrimination by reason of sex to which she was subjected. Her cause of action was based on Act No. 100 of June 30, 1959, which bans discrimination in employment, 29 L.P.R.A. § 146 *et. seq.*; Act No. 3 of March 13, 1942 known as the Working Mothers' Protection Act, 29 L.P.R.A. § 467 *et seq.*; and Act No. 69 of July 6, 1985, which bans discrimination in employment for reason of sex, 29 L.P.R.A. § 1321 *et seq.* Plaintiff alleges that since she got married she became the object of recriminations, persecutions, and humiliations on the part of the defendant. She further alleged that she had been denied promotions and salary increases, and that they even asked her

[1] See: *Odriozola* v. *S. Cosmetic Dist. Corp.*, 116 D.P.R. 485, 508 n. 10 (1985).

to submit her resignation. This discriminatory attitude towards her intensified when she became pregnant. Finally, Garcia Pagan alleged that defendant's conduct had caused her mental anguish and physical disorders that forced her to seek medical treatment.

Defendant Shiley Caribbean, on the other hand, brought a Petition for Partial Dismissal, arguing that the claim for damages and mental anguish and suffering did not lie under the aforecited legal provisions. After holding a hearing, the Superior Court dismissed all the claims for mental anguish and suffering and concluded that in the light of the discrimination statutes invoked, she is only entitled—as compensation for mental anguish and suffering to a sum between one hundred dollars ($100) and one thousand dollars ($1,000), at the court's discretion. The court concluded further that the remedy provided by these statutes is exclusive and bars a claim for damages under art. 1802 of the Civil Code.

Plaintiff sought review of the partial judgment rendered by the Superior Court. We agreed to review in order to determine which are the compensable damages in actions for violation of the cited statutes.

II

In view of the nature and importance of this controversy, several preliminary pronouncements are in order. A careful analysis of the text and legislative history of these statutes shows that they mainly sought to eradicate all types of discrimination in employment in Puerto Rico. They are part of an integral Legislative scheme which incorporates the postulates embodied in the Bill of Rights of our Constitution banning discrimination "on account of race, color, sex, birth, social origin or condition, or political or religious ideas." Art II, Sec. 1, of the Constitution of the Commonwealth of Puerto Rico. In its report to the Constitutional Convention, the Bill of Rights Committee defined the purpose and scope of this provision of the Commonwealth Constitution.

The purpose of this section is to clearly establish, as consubstantial basis of everything that follows the dignity of the human being, and, as a consequence thereof, the essential equality of all persons within our constitutional system. Equality before the law is above all accidents or differences, originating either in nature or in culture. Any discrimination or privilege contrary to this essential equality is repugnant to the Puerto Rican legal system. In all that is pertinent, our legal order is strengthened by this constitutional provision and is in turn obliged to widen its provisions to fully realize what is provided herein. *Diario de Sesiones de la Convencion Constituyente* 2561.

This section of the Bill of Rights further provides that the laws "shall embody these principles of essential human equality". In the lengthy report rendered by the Bill of Rights Committee to the Constitutional Convention, it stipulated that "the vast scope [of these postulates] require detailed legislative implementation." 4 *Diario de Sesiones de la Convencion Constituyente* 2563.

When the Legislative Assembly approved Act No. 100, it ratified these constitutional postulates and designed some remedies to implement this provision of the Bill of Rights within the labor-management context. It sought to give workers the necessary tools to protect them from discrimination by reason of age, race, color, sex, social or national origin, social condition, and political and religious ideas.[2]

As an additional protection for working women, Act No. 3 of March 13, 1942, *supra*, amended by Act No. 39 of June 19, 1969, and Act No. 69 of July 6, 1985, *supra*, were passed. Act No. 3 pursues the protection of the rights of pregnant working women, establishing a maternity leave before and after childbirth, 29 L.P.R.A. § 467, and prohibiting the dismissal, suspension, salary reduction, or any other type of dis-

[2] Act No. 100 was subsequently amended to widen its scope and ban sex-discrimination, Act No. 50, May 30, 1972. And to ban discrimination by reason of social and national origin, Act No. 67, June 3, 1983.

crimination against the woman worker on account of a decrease in the amount of work done because of the pregnancy. 29 L.P.R.A. § 469. Act No. 69, *supra*, seeks greater guarantees for the country's labor force by establishing a series of protections designed to discourage discriminatory practices [by reason of sex] against women, in the facets of job opportunities, wages, and fringe benefits. *Joint Report on S.B. 130, Committees on Socio-Cultural Development and Legal Matters of the Senate of Puerto Rico.* In passing said legislation, the Legislative Assembly resolved and stated that the values of equality and freedom expressed in the Constitution of the Commonwealth of Puerto Rico are the keystone of Puerto Rican society. It is our duty to ascertain the strict compliance of the constitutional guarantee that all persons have that they will not be discriminated against on account of their sex. 29 L.P.R.A. § 1321.

To secure compliance, these statutes provide a civil action and a criminal action against any employer who discriminates against an employee. See, 29 L.P.R.A. §§ 146, 469, and 1341, respectively. The compensation scheme is the same in all of them:

> (a) shall incur *civil liability*
>
> (1) for a sum equal to twice the amount of *damages* sustained by the employee or applicant for employment on account of such action;
>
> (2) or for a sum of not less than one hundred (100) nor more than one thousand (1,000) dollars, in the discretion of the court, if no *pecuniary damages* are determined;
>
> (3) or twice the amount of the *damages* sustained, if such amount is under the sum of one hundred (100) dollars (Emphasis supplied.)

In this case we must construe and define the scope of the cited legal provision, which after being incorporated into the text of Act No. 100, has been repeatedly included in all later similar legislation, 29 L.P.R.A. §§ 469 and 1341.

Although when the lawmakers passed Act No. 100 of 1959,

they did not discuss the scope of the remedies, the floor debate preceding the 1960 amendment to the Civil Rights Act of Puerto Rico is indicative of the wide range of means available to the workers. The Civil Rights Act, No. 131 of May 13, 1943 (1 L.P.R.A. §§ 13-19), bars discrimination in public places, businesses, transportation, and housing.[3] Originally, this legislation only established criminal penalty against those persons who engaged in the banned conduct. However, in *Muriel* v. *Suazo*, 72 P.R.R. 348 (1951), the Court construed the same as allowing a civil action under art 1802 of the Civil Code for moral damages suffered by a person who was discriminated against. In 1960, the Civil Rights Act was amended to incorporate our decision in *Muriel* v. *Suazo*, while at the same time it was widened to further award punitive

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[3] "(a) No person shall be denied in the Commonwealth of Puerto Rico any access, service and like treatment in public places and businesses and in the means of transportation because of any political, religious, race, or color question, or because of any other reason not applicable to all persons in general.

"(b) The publication, circulation, or distribution of any order, notice or advertisement tending to prevent, prohibit, or discourage the patronage, or the attendance at public places and businesses and the means of transportation, because of questions of politics, religion, race or color, shall be illegal.

"(c) No person having the right to sell, lease or sublease a dwelling, may refuse to grant an option for selling, or to sell, lease or sublease said dwelling to any other person or group of persons for reasons of politics, religion, race or color.

"(d) The publication or circulation of advertisements, notices, or any other forms of dissemination, establishing limitations or requirements regarding political affiliation, religious ideas, race, or color, as a condition for the acquisition of living quarters, or for the granting of loans for dwelling construction shall be illegal.

"(e) No natural or artificial person engaged in the business of granting loans for dwelling construction may refuse to render such service to any other person or group of persons for reasons of politics, religion, race, or color." 1 L.P.R.A. § 13.

damages. Act No. 125 of July 13, 1960; 1 L.P.R.A. § 13.[4] An amendment proposed at that time to extend the remedies of the Civil Rights Act to cases of discrimination in employment did not prosper. The legislative history indicates that the lawmakers understood that the recently approved Act No. 100 of 1959 established *equally ample* remedies to avoid discrimination in employment and to compensate the aggrieved parties. See XIII-4 *Diario de Sesiones* 1578 (1960).[5] Since all this legislation seeks to eradicate discrimination from our society, their provisions should be harmoniously read, R.E. Bernler and J. A. Cuevas Segarra, *Aprobacion e interpretacion de las leyes en Puerto Rico* 481 (2d ed. 1987), to avoid interpretations that could lead to unreasonable or absurd results, or give rise to distinctions lacking a rational basis. *Atiles, Mgr. State Ins. Fund* v. *Industrial Comm'n*, 77 P.R.R. 15, 19 (1954).

III

This innovative social legislation has its federal equivalent in the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* In *Odriozola* v. *S. Cosmetic*, *supra*, we analyzed some of the standards applicable to discrimination cases under the ADEA, and although said statute

[4] Act No. 125 of July 13, 1960 added, among other things, the following two paragraphs to art 2:

> "Any person aggrieved by any violation of sections 13 to 19 of this title may bring the corresponding civil action in a competent court for the damages such violation may have caused him.
>
> "If the remedy is granted, the court shall, in addition to the proper compensation for losses and damages caused, impose the payment of another indemnity as punitive damages." 1 L.P.R.A. § 14.

[5] With regard to Act No. 100, they said at the time that a "complete law" had been recently passed to regulate all facets of discrimination in employment.

was passed after Act No. 100, we have adopted some of its rules in view of the similarity of purposes of both statutes. However, although the federal experience is beneficial, we are not bound to adopt its judicial interpretation of these analogous statutes, especially when in Puerto Rico, contrary to the United States, our legislation answers an express constitutional prohibition against all types of discrimination.

In this particular controversy before our consideration, analogous federal statutes do not provide specific remedies to recover emotional damages for discriminatory removals. See *Odriozola*, *ante*, n. 10. Neither does this remedy exist under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq*. See, B. L. Schlei, *Employment Discrimination Law* 1452-1453, Washington, D.C., BNA, Inc. (1976); C. A. Sullivan, M. J. Zimmer, R. F. Richards, *Federal Statutory Law of Employment Discrimination*, Indianapolis, The Michie Co. (1980); *Developments in the Law; Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977); *Vazquez* v. *Eastern Air Lines, Inc.*, 579 F.2d 107 (1st Cir. 1978); *Harrington* v. *Vandalia-Butler Bd. of Ed.*, 585 F.2d 192 (6th Cir. 1978). This rule has been strongly criticized in the United States because it does not provide adequate compensation for victims of discrimination and ignores the psychological and emotional harm they suffer. See: M.J. Goldberg, *Implying Punitive Damages in Employment Discrimination Cases*, 9 Harv. C.R.-C.L.L. Rev. 325, 369 (1974); *Tort Remedies for Employment Discrimination Under Title VII*, 54 Va. L. Rev. 491 (1968); Note, *Damage Remedies Under the Age Discrimination in Employment Act*, 43 Brooklyn L. Rev. 47 (1976); R. F. Richards, *Compensatory and Punitive Damages in Employment Discrimination Cases*, 27 Ark. L. Rev. 603 (1973); *Developments in The Law*, *op. cit.*, at 1261-1269.

However, some district courts have allowed the plaintiff to recover damages, including mental anguish caused by dis-

crimination, holding that the statute's intent is thus better served and advanced if the claimant is compensated for all the harm suffered. *Humphrey* v. *Southwestern Portland Cement Company*, 369 F.Supp. 832 (1973); *reversed on other grounds* in 488 F.2d 69 (1974); *Wise* v. *Olan Mills Inc. of Texas*, 485 F.Supp. 542 (1980); *Coates* v. *National Cash Register Co.*, 433 F.Supp. 655 (1977); *Hassan* v. *Delta Orthopedic Medical Group, Inc.*, 476 F.Supp. 1063 (1979); *Kennedy* v. *Mountain States Tel. & Tel. Co.*, 449 F.Supp. 1008 (1978).

However, federal case law on Title VII and the ADEA is not very persuasive when dealing with a damages award for mental sufferings under the local discrimination in employment statute. The remedies under the ADEA for the victims of age-discrimination are those contained in the Fair Labor Standards Act, 29 U.S.C. § 216(b),[6] and damages for mental anguish is not among them. Title VII, on the other hand, has been construed as only providing equitable remedies, 42 U.S.C. § 2000e-5(g) and not legal remedies. Schlei, *op. cit.*; Sullivan, *op. cit.*; *Albemarle Paper Co.*, *supra*. This distinction between equitable remedies vis-a-vis legal remedies is not applicable under our legal system.[7]

On the other hand, under state civil rights legislation, it has been widely recognized that mental anguish and suffering may be recovered. Anno., *Recovery of Damages as Remedy*

[6] "Any employer who violates the provisions of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

[7] The United States District Court for the District of Puerto Rico held in *Wildman* v. *Lerner Stores Corp.*, 582 F.Supp. 80 (1984), that damages and mental sufferings are not compensable under the provisions of Act No. 100, based on the same grounds that restrict those remedies available under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. The Federal Court concluded that Act No. 100 created a cause of action where no compensation was available for moral damages and that the lawmaker had wanted to restrict the remedies awarded for the same.

Unfortunately, when this decision was rendered, the District Court did not have this Court's interpretation on this controversy of state law.

for Wrongful Discrimination Under State or Local Civil Rights Provisions, 85 A.L.R.3d 351, 355; Anno., *Recovery of Damages for Emotional Distress Resulting from Discrimination because of Sex or Marital Status*, 61 A.L.R.3d 944, 945.[8] The trend in the States is to construe civil right provisions amply so as to assure their effectiveness as a means to combat discrimination. Anno., *Recovery of Damages as Remedy for Wrongful Discrimination Under State or Local Civil Rights Provisions, supra* at 358.

For effects of recovery, our case law makes no distinction between bodily, pecuniary, or moral damages. *Correa* v. *P.R. Water Resources Authority*, 83 P.R.R. 139, 148 (1961); *Vazquez* v. *People*, 76 P.R.R. 556 (1954); *Hernandez* v. *Fournier*, 80 P.R.R. 94, 97 (1957). Damage is any material or moral loss suffered by a person, either in its natural rights or in its property or patrimony, brought about by violation of a legal provision and which is chargeable on another party. J. Santos Briz, *La Responsabilidad Civil* 126, Madrid, Ed. Montecorvo (3d ed. 1981); XXIV *Comentarios al Codigo Civil y compilaciones forales* 156, Madrid (1984); H. Brau, *Los danos y perjuicios extracontractuales en Puerto Rico* 427, San Juan, P.R. (2d ed.). Civil liability is, precisely, the duty to redress the aggrieved party, fixing an economic value on the damage suffered. J. Bustamante Alsina, *Teoria general de la responsabilidad civil* 135, Buenos Aires, Abeledo-Perrot (4th Ed. 1983). "'[M]onetary or pecuniary reparation consists in

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[8] See, *Gray* v. *Serruto Builders, Inc.*, 265 A.2d 404 (N.J. 1970); *Zahorian* v. *Russell Fitt Real Estate Agency*, 301 A.2d 754 (N.J. 1973); *Dir. Div. on Civil Rights* v. *Slumber, Inc.*, 398 A.2d 1345 (N.J. 1979); *Williams* v. *Joyce*, 479 P.2d 513 (Or. 1971); *School District No. 1, Multnomah County* v. *Nilsen*, 534 P.2d 1135 (Or. 1975); *Massachusetts Comm'n Against Discrim.* v. *Franzaroli*, 256 N.E.2d 311 (Mass. 1970); *Bournewood Hosp.* v. *Mass. Comm. Against Discrim.*, 358 N.E.2d 235 (Mass. 1976); *Anderson* v. *Pantages Theater Co.*, 194 P. 813 (Wash. 1921); *Humburd* v. *Crawford*, 105 N.W. 330 (Iowa 1905); *Loomis Electronics Protection, Inc.* v. *Schaefer*, 549 P.2d 1341 (Alaska 1976); *Board of Educ.* v. *State Div. of Human Rights*, 486 N.Y.S.2d 469 (1985); *New York State Dept. of Corr. Serv.* v. *McCall*, 486 N.Y.S.2d 443 (1985); *Chance* v. *Frank's Beauty Salon*, 316 N.Y.S.2d 236 (1970).

awarding to the aggrieved party an amount of money sufficient to compensate his aggrieved interest. *It is like a real subrogation, where money will take the place of the damages sustained.* It is a pecuniary award which creates a patrimonial situation equivalent to the situation destroyed by the damage done.'" (Emphasis in the original.) *Rodriguez Cancel* v. *A.E.E.*, 116 D.P.R. 443, 455-456 (1985).

Although, in principle, intangible damages such as suffering, mental anguish and emotional damages are not considered patrimonial damages since their pecuniary value is not based on a mathematical equivalence, they are still recoverable in terms of money. Santos Briz, *op. cit.*, at 140-149; Brau, *op. cit.*, at 427; Ortiz Ricol, *Valoracion juridica del dano moral*, 3 Rev. Der. Esp. y Amer. 141 (1958). After all, moral damages may be of such magnitude that their importance exceeds any pecuniary damage sustained.

For some time now this Court has acknowledged the existence in Puerto Rico of a civil action for damages for civil rights violations. *Muriel* v. *Suazo, supra.* In that case, the Court adopted the rule that a statute for the protection of civil rights, although a penal statute, does not bar a right of action for civil damages, for where the statute imposes upon any person a specific duty for the protection and benefit of others, his neglect to perform such duty creates a liability for any resulting injury. At 353. We further acknowledged *that the damage caused by a humiliation suffered as a result of this type of discrimination is more important than many physical injuries.* At 352. Because of the importance of the right protected, all these statutes provide ample remedies, of a civil and criminal nature, to fight discrimination. During the floor debate on Act No. 100, Senator Negron Lopez clearly stated the lawmakers' intent:

> *I think that this is a simple Bill* that addresses a difficult problem, as my colleague well states, but in a simple manner. *It establishes civil and criminal actions against discrimination. That is the classical way in which all legislations, the old legislation against racial discrim-*

> *ination in Puerto Rico* that are in force, I think, since 1941 or '42, and a very old civil rights law, in general, in force since 1902, *the manner in which they deal with this difficult problem of discrimination is by establishing a criminal action and a civil action*, because that is the educational scope and *the law serves its purpose in this educational manner*, by showing the people an order, a conduct, and a correct social behavior in this manner, without intervening with their relations, with the organization of their business or with other aspects of their operation as suggested here during this debate (Emphasis supplied) XII-2 *Diario de Sesiones* 688 (1959).

By stating that Act No. 100 established a civil action in the "classical way," just like the legislation against social discrimination, the lawmaker acknowledged that the remedy provided by this statute was going to have the same scope as the one allowed in *Muriel* v. *Suazo*, in its construction of the 1943 Civil Rights Act. We have no doubt in our minds as to the fact that they have to be the same.

In *Olmo* v. *Young & Rubicam of P.R., Inc.*, 110 D.P.R. 740, 745 (1981), we recognized that the precedent set in *Muriel* was not limited to racial discrimination and that the rule established therein was applicable, absent legislation to the contrary, to the civil action for discrimination under Act No. 100. Moreover, we reaffirm the existence in Puerto Rico of a cause of action for damages based on discrimination in employment, especially recognized through Act No. 100.

Finally, we must reiterate and stress the hermeneutical rules that guide our interpretative function. The main purpose of statutory construction is to establish the legislative intent and avoid interpretations that may lead to unreasonable results. *Diaz Marin* v. *Mun. de San Juan*, 117 D.P.R. 334 (1986); *Passalacqua* v. *Mun. de San Juan*, 116 D.P.R. 618 (1985); *Lozada* v. *Antonio Roig, Sucrs.*, 73 P.R.R. 255, 259 (1952); *In re Marin*, 81 P.R.R. 267, 271 (1959); *Borinquen Furniture* v. *Dist. Court; Umpierre, Int.*, 78 P.R.R. 858, 861

(1956); Bernier and Cuevas Segarra, *op. cit.*, at 245-247. A part of a statute should not be read as defeating the purposes of the statute itself. *Latoni* v. *Municipal Court*, 67 P.R.R. 130 (1947).

> Since interpretation seeks to ascertain the lawmaker's intent, "[l]aws should be construed and applied in consonance with the social end inspiring them. They should not be isolated from the human problem whose solution they pursue; they must not be stripped of the realities of life which society itself has projected over them, for the sense of justice which inspires them would then become illusory and lost in a vacuum." *Figueroa* v. *Diaz*, 75 P.R.R. 152, 160 (1953) (opinion of Justices Negron and Belaval). Bernier, *op. cit.*, at 179.

When faced with legislation whose principal aim is to correct the adverse effect of an unconstitutional action, we should favor the construction that better protects human rights. We should always bear in mind that the laws "regarding social justice . . . should be liberally construed in order to effectuate the lofty purpose sought by the lawmaker." *Torres* v. *Gonzalez*, 63 P.R.R. 925, 933-934 (1944); Bernier and Cuevas Segarra, *op. cit.*, at 461.

With these considerations in mind, we will now examine the text of the statutory provision that imposes civil liability for the violation of the labor laws banning discrimination in employment. 29 L.P.R.A. §§ 146, 469, and 1341.[9]

IV

The civil action under Act No. 100 provides that the person who violates its provisions shall incur civil liability "for a sum

[9] Since the text of the provision imposing civil liability is the same text used in Acts No. 100, 3, and 69, and given that they have analogous aims, it is only logical that our present interpretation be applicable to the three statutes.

equal to twice the amount of *damages* sustained. (Emphasis supplied.) No classification or limitation as to the type of damage arises from the wording of the statute. When the lawmakers passed Act No. 100 they were aware that our legal system allowed recovery for mental anguish and sufferings. See the aforecited statements of Senator Negron Lopez. Seeing that the purpose of the Legislature was to pass a bill that not only barred discrimination but also imposed civil liability for damages sustained, we cannot conclude, absent a legislative pronouncement to the contrary, that the law excluded compensation for mental anguish and sufferings. All to the contrary, if we consider that the legislative trend has been to broaden and expand civil rights protection and seek true and genuine compliance with the mandates of our Constitution, we must inevitably conclude that the Legislative Assembly approved a remedial scheme with all the necessary means to redress the victims for the damage suffered as a result of discrimination in employment. Only in that way can we impart true meaning to the principle established in our Bill of Rights, which reads, "[t]he dignity of the human being is inviolable."

The statutes in controversy herein embody the correct formula for dealing with compensation for discrimination in the labor-management field. Any comparative law inquiry can only serve as clarifying factor. There are some ideas, however, that have universal value. "Under this understanding . . . the labor contract has an essentially ethical character, by virtue of which the worker's personality becomes a fundamental factor and hence anything that may affect the moral sphere where the labor relation takes place produces consequences that may impose liability on the author." E. R. Martorell, *Indemnizacion del dano moral por despido* 145, Buenos Aires, Ed. Hammurabi (1985).

The dissenting opinion is based on the premise that the remedial formula in subitem (a)(2) "qualifies the coverage" of subitem (a)(1), although accepting "*that under the generic concept of 'damages,' the employer's civil liability could be understood to mean that it covers all types of injuries. Sup-*

port for this view can be found in subitem (1) which provides that liability is for twice the amount of 'damages,' without any restriction or classification. Likewise, subitem (3) does not qualify the word 'damages.' (Emphasis supplied.)

The lawmaker's intent was to devise a formula to redress damages arising from discrimination in employment. Although the Constitution is the source of remedies, the statute provides the quantum of the damages to be compensated.

Note that if we were to decide otherwise, by judicial fiat we would be turning a worker protection legislation into a privileged legislation for the employer, who for all practical purposes could obtain a de facto partial immunity from discrimination in employment claims. Whenever the lawmaker has wanted to grant immunities and exclusive remedies he has expressly stated it, as was the case in the Workmen's Accident Compensation Act, 11 L.P.R.A. § 21. Schemes of this nature, tending to repeal the general civil liability rules prevailing in our country, cannot be lightly inferred. It is incumbent upon the Legislative Assembly to restrict the available remedies.

The legislative intent was to pass a statute to widen the protective resources of the worker. Hence, the lawmaker did not pass legislation to expressly restrict the existing remedies. This was not the case, however, with Act No. 80 of March 30, 1976, where the lawmaker established compensation for discharge without just cause, limiting the same to the salary or an additional progressive indemnity equivalent to one week for each year of service. 29 L.P.R.A. § 185a. The lawmaker recognized in this manner the conceptual difference between redress for a violation of a fundamental right, and compensation for a statutorily based pecuniary right.

We hold, then, that when Act No. 100 provides that civil liability would be for a sum equal to twice the amount of damages that the action has caused, it refers *to all damages sustained by the victim, including mental anguish and sufferings, in those cases, of course, where they are established by plaintiffs.* As different components of the damages, one does not absorb the other.

Shiley's contention to exclude compensation for mental anguish and suffering from Act No. 100, is that this type of compensation is imprecise and uncertain. It also argues that awarding compensation for mental suffering could stir up unjustified complaints against employers. Although we understand this concern, this argument totally disregards the socio-economic and constitutional purposes of the act and limits the scope of its protection against discrimination in employment. On the other hand, the courts have the necessary resources to discourage frivolous litigations, including sanctions against attorneys.

This Court has already recognized the difficult and painful judicial task of computing and assessing damages, absent an accurate mechanical system of reaching an exact result. *Rodriguez Cancel* v. *A.E.E.*, 116 D.P.R. 443, 451 (1985); *Urrutia* v. *A.A.A.*, 103 D.P.R. 643 (1975). The presence of a certain degree of speculation does not bar the Court from determining an adequate and reasonable amount to compensate the plaintiff for the damages sustained based on the particular facts, the evidence presented, and the established criteria. *Publio Diaz* v. *E.L.A.*, 106 D.P.R. 854, 871 (1978); *Urrutia* v. *A.A.A.*, *supra; Rodriguez Cancel* v. *A.E.E.*, *supra; Canales Velazquez* v. *Rosario Quiles*, 107 D.P.R. 757 (1978); Santos Briz, *op. cit.*, at 140-169; Brau, *op. cit.*, at 427; Ortiz Ricol, *Valoracion juridica del dano moral*, *op. cit.*, at 141.

Defendant argues further that item two of the civil liability provision limits compensation for mental anguish and suffering to a maximum of one thousand dollars ($1,000). Item two provides that if "no pecuniary damages are determined," the court, at its discretion, shall award compensation for a sum of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000). Defendant construes this section as establishing that when no loss of income is present, and the damage sustained is either moral or mental, the same shall be compensated according to the aforecited limits. It alleges that when the statute says that in the event "no

pecuniary damages are determined" it refers to mental anguish and suffering.

This argument does not convince us. There are certain high-ranking rights within our system of government, the violation of which is not just an affront to the victim whose right was violated, but also an affront to the State's interest. The State not only should abstain from violating such rights but must also intervene to protect the citizens. The State must take affirmative action in behalf of the citizen's welfare. III J. Trias Monge, *Historia Constitucional de Puerto Rico* 200, Rio Piedras, Ed. Universitaria (1983).

The principles of equality embodied in our Constitution, and incorporated into the provisions of Act No. 100, are this type of right. Discrimination on basis of age, race, color, sex, social or national origin, political or religious ideas, is as much an act against society as it is against the individual. Through Act No. 100, the Legislative Assembly took affirmative steps to ban and penalize discrimination in employment. Mere violation of the right is in itself a compensable damage.

To scrupulously protect these fundamental rights, the Legislature imposed civil liability for the mere violation of the interest protected, even in the absence of proof of the damage by the aggrieved party. The mechanism to enforce this legislation has been used in the United States to protect civil rights. *Carey* v. *Piphus*, 435 U.S. 247 (1978); *Tatum* v. *Houser*, 642 F.2d 253 (8th Cir. 1981); *Dillon* v. *Pulaski Cty. Special Sch. Dist.*, 468 F. Supp. 54 Ark 1978).

This is precisely the civil liability scheme of Act No. 100, "[i]f no pecuniary damages are determined," or in other words, when it is impossible to calculate and compensate in money the loss or damage (material and/or moral) that the deprivation of the right has caused to the claimant, either because the latter did not bring evidence of its existence or because the evidence brought was not sufficient to enable the Court to assess the magnitude of the damage, the Court can, at its discretion, award from one hundred dollars ($100) to one thousand dollars ($1,000) in compensation.

This does not bar compensating the victim pursuant to item (1), that is, "twice the amount of damages sustained . . . on account of such action," if only moral damages are proved. After all, moral or mental suffering, as stated above, are also susceptible to pecuniary assessment. Martorell, *op. cit.*, at 57-66.

In the light of the legislative intent pursued by the lawmaker in passing the statutes against discrimination in employment that we construe herein, and in order to fully enforce their provisions, we hold that under Act No. 100 of June 30, 1959 (29 L.P.R.A. § 146 *et seq.)*, which bans discrimination in employment, and under the Working Mothers' Protection Act, No. 3 of March 13, 1942 (29 L.P.R.A. § 467 *et seq.)*, and also under Act No. 69 of July 6, 1985 (29 L.P.R.A. §§ 1321-1341), redress for mental anguish and suffering is in order.

The case will be remanded to the trial court for further proceedings consistent with this opinion.